FILED

(1) No. 97 721 OCT 27 1997

OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1997

COUNTY OF SAN JOAQUIN, et al.,

Petitioners,

vs.

STATE WATER RESOURCES CONTROL BOARD, et al.,

Respondents.

On Petition For Writ Of Certiorari To The Court Of Appeal Of The State Of California Third Appellate District

PETITION FOR WRIT OF CERTIORARI

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206 pp

QUESTIONS PRESENTED

I. In determinations under Rule 19(b) of the Federal Rules of Civil Procedure, of whether to proceed in the absence of a necessary party, what is the weight to be placed on Constitutional considerations, such as Due Process and Equal Protection, when such considerations come into conflict with sovereign immunity?

II. What is the standard of review on appeal of a trial court's determination pursuant to Rule 19(b) of the Federal Rules of Civil Procedure that a necessary party which cannot be joined is indispensable, and that the action must be dismissed?

III. When, under Section 8 of the Reclamation Act of 1902, the federal government obtains appropriative water right permits and seeks modification of permit terms and conditions, do state courts have jurisdiction to review the adjudicatory proceeding in which the appropriative permit was issued or modified?

QUESTIONS PRESENTED – Continued

IV. Is there a denial of Equal Protection in a state water right proceeding before California's State Water Resources Control Board initiated on the joint petition of California's Department of Water Resources, and the United States Bureau of Reclamation, when an interested party with vested rights is denied judicial review of the proceeding in state court due to the federal government's assertion of its sovereign immunity, and the state government's assertion of its Eleventh Amendment immunity in the United States courts, so as to avoid review in the courts of both the state and the United States?

V. Is there a denial of Due Process in a state water right proceeding before California's State Water Resources Control Board initiated on the joint petition of California's Department of Water Resources and the United States Bureau of Reclamation, when an interested party with vested water rights is denied judicial review of the proceeding in state court due to the federal government's assertion of its sovereign immunity, and the state government's assertion of its Eleventh Amendment immunity in the United States courts, so as to avoid review in the courts of both the state and the United States?

VI. Are the courts of the United States and the state without jurisdiction to provide complete review of an adjudicatory proceeding of a state administrative body concerning appropriative water right permits of a federal agency acting under the direction of Section 8 of the Reclamation Act of 1902, and a state agency, which jointly initiate proceedings before the body to modify their respective permits?

PARTIES TO THE PROCEEDING BELOW

The Petitioners County of San Joaquin, Stockton East Water District, Central San Joaquin Water Conservation District, Central Delta Water Agency, South Delta Water Agency, and Reclamation District No. 2072 are political subdivisions of the State of California. R.C. Farms, Inc. is a California corporation without parent, subsidiary, or affiliate companies, and Alexander Hildebrand is an individual resident of the State of California.

Respondent State Water Resources Control Board is an administrative body of the State of California, and Respondents John P. Caffrey, Marc Del Piero, James M. Stubchaer, Mary Jane Forster, and John W. Brown, sit as members of the Board.

Real Parties In Interest and Respondents are the United States of America, acting by and through the Department of the Interior, Bureau of Reclamation, and the State of California, acting by and through the Resources Agency and its Department of Water Resources.

Intervenors and Respondents are Westlands Water District, San Luis Water District, Panoche Water District, Kern County Water Agency, Santa Clara Valley Water District, Metropolitan Water District of Southern California, and State Water Contractors.

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OPINIONS AND DECISIONS BELOW

The Order of the Supreme Court of the State of California, denying the Petition for Review in that Court, is printed as Appendix 1 hereto at App.1, and is unreported docket number S062126.

The Opinion of the Court of Appeal of the State of California, Third Appellate District, affirming the Judgment of Dismissal of the Superior Court, is printed as Appendix 2 hereto at App.2, and is reported at 54 Cal.App.4th 1144.

The Ruling on Submitted Matter made by the Superior Court of the State of California, County of Sacramento, wherein the Superior Court determined that the United States Bureau of Reclamation was an indispensable party and that because the Bureau refused to waive its sovereign immunity, the action would be dismissed, is printed as Appendix 3 hereto at App.22, and is unreported docket number 95 CS 01642.

The water rights decision of the State Water Resources Control Board of the State of California entitled "Order Denying Petitions For Reconsideration Of Order WR 95-6, Which Approved Changes In The Water Rights Of The California Department Of Water Resources And The United States Bureau Of Reclamation Affecting The Bay-Delta Estuary" is printed as Appendix 4 hereto at App.27, and is unreported Order: WR 95-14.

The water rights decision of the State Water Resources Control Board of the State of California entitled "Order Regarding Petition For Changes In Water Rights That Authorize Diversion And Use Of Waters Affecting The San Francisco Bay/Sacramento-San Joaquin Delta Estuary" is printed as Appendix 5 hereto at App.70, and is unreported Order: WR 95-6.

The Judgment of Dismissal of the Superior Court of the State of California, County of Sacramento, is printed as Appendix 6 hereto at App.151, and is unreported docket number 95 CS 01642.

JURISDICTION

The jurisdiction of this Court is invoked under Title 28, Section 1257(a) of the United States Code. The judgment of the Superior Court was entered on February 21, 1996. (App.151.) The Decision of the Court of Appeal of the State of California made on May 6, 1997, which petitioners seek to have reviewed was rendered by the highest court of the State of California to which review could be had. (App.2.) Discretionary review on the Petition for Review by the California Supreme Court, the state court of last resort, was denied on July 30, 1997. (App.1.) This petition is timely filed under Rule 13 of the Rules of the Supreme Court of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment of the Constitution of the United States:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 8 of the Reclamation Act of 1902, 32 Stat. 390, codified in pertinent part at Title 43 United States Code section 383 provides:

> Nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any

vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof.

Rule 19 of the Federal Rules of Civil Procedure provides:

> **(a) Persons to be Joined if Feasible.** A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest. If the person has not been so joined, the court shall order that the person be made a party. If the person should join as a plaintiff but refuses to do so, the person may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and joinder of that party would render the venue of the action improper, that party shall be dismissed from the action.
>
> **(b) Determination by Court Whenever Joinder not Feasible.** If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in

equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

(c) Pleading Reasons for Nonjoinder. A pleading asserting a claim for relief shall state the names, if known to the pleader, of any persons as prescribed in subdivision (a)(1)-(2) hereof who are not joined, and the reasons why they are not joined.

(d) Exception of Class Actions. This rule is subject to the provisions of Rule 23.

California Code of Civil Procedure Section 389 provides:

(a) A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of

incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party.

(b) If a person as described in paragraph (1) or (2) of subdivision (a) cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed without prejudice, the absent person being thus regarded as indispensable. The factors to be considered by the court include: (1) to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; (2) the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; (3) whether a judgment rendered in the person's absence will be adequate; (4) whether the plaintiff or cross-complainant will have an adequate remedy if the action is dismissed for nonjoinder.

(c) A complaint or cross-complaint shall state the names, if known to the pleader, of any persons as described in paragraph (1) or (2) of subdivision (a) who are not joined, and the reasons why they are not joined.

(d) Nothing in this section affects the law applicable to class actions.

I. STATEMENT OF THE CASE

A. FACTUAL STATEMENT

Many of the basic facts underlying this case have been visited by this Court in *Dugan v. Rank*, 372 U.S. 609, 83 S.Ct. 999, 10 L.Ed.2d 15 (1963), and *California v. United States*, 438 U.S. 645, 98 S.Ct. 2985, 57 L.Ed.2d 1018 (1978).

California's great Central Valley Basin includes the Sacramento Valley in the north, containing the Sacramento River. The basin also includes the San Joaquin Valley, in the south, which includes the San Joaquin River. (*Dugan*, 372 U.S. 612.) Due to heavier rainfall in the north, the Sacramento River has a "surplus" of water, but its valley has little available tillable soil. (*Ibid.*) The San Joaquin River, however, "is in the contrary situation." (*Id.*) The San Joaquin River joins the Sacramento River in the Sacramento-San Joaquin Delta (hereinafter "Delta"), before the Sacramento River empties into San Francisco Bay and the Pacific Ocean. (*Id.*) The region including the San Francisco Bay is known as the Bay-Delta Estuary.

California has two massive water projects, the Central Valley Project (hereinafter "CVP") operated by the United States Bureau of Reclamation (hereinafter "Bureau"), and the State of California's State Water Project (hereinafter "SWP") operated by the state's Department of Water Resources (hereinafter "DWR"). (*United States v. State Water Resources Control Bd.*, 182 Cal.App.3d 82, 97 (1986); see also *County of San Joaquin v. State Water Resources Control Bd.*, 54 Cal.App.4th 1144, 1147 (1997) App.4-5.) The appropriative water permits necessary for these projects are issued by California's State Water Resources Control Board (hereinafter "Water Board"), and the Bureau's CVP is the largest reclamation project in the United States. The Delta provides a conduit for the transfer of water by these two projects, which store water in reservoirs and divert water from rivers flowing into the Delta. (*United States v. State Water Resources Control Bd.*, 182 Cal.App.3d 97.) Pumps at the southern edge of the Delta are utilized to lift water into canals for transport south to farmers in the Central Valley and to municipalities in Southern California. (*Ibid.*) The Bureau and the DWR have a combined total of some 34 permits for various units of the CVP and SWP authorizing the diversion and use of the Delta's waters. (*Id.*)

Petitioner County of San Joaquin is located partly in the Delta, the San Joaquin River traversing the southern part of the county before it joins the Sacramento River just west of the county. Stockton East Water District (hereinafter "SEWD") is a local water district formed pursuant to a special act of the State of California, and Central San Joaquin Water Conservation District ("CSJWCD") is a water conservation district formed under state law. SEWD and CSJWCD are located in San Joaquin County, and have contracts with the Bureau for the supply of water from New Melones Dam, the component of the CVP involved in *California v. United States*, 438 U.S. 645. Petitioners Central Delta Water Agency and South Delta Water Agency are political subdivisions of the state representing the interests of riparian water right holders and others in the Delta area. Reclamation District No. 2072 is an appropriative water right holder in the Delta area, and R.C. Farms, Inc. and Alexander Hildebrand are riparian water right holders in the Delta area.

Water quality degradation in the southern region of the Delta is caused not by ocean water intrusion, but instead "mainly by upstream depletions of the San Joaquin River and salt infusion from irrigation waste – water runoff carried by the San Joaquin River." (*United States v. State Water Resources Control Bd.*, 182 Cal.App.3d 121.) The project operations of DWR and the Bureau "are inextricably interrelated", and as early as 1960 the Bureau and DWR entered into a preliminary agreement for the coordinated operation of the projects. (*Ibid.*, 182 Cal.App.3d 131-132.) In 1986, Congress authorized and directed the Secretary of the Interior to execute and implement the "Agreement Between the United States of America and the Department of Water Resources of the State of California for Coordinated Operation of the Central Valley Project and the State Water Project" dated May 20, 1985. (Act of Congress approved October 27, 1986, Public Law 99-546, section 103, amending Act of August 26, 1937, 50 Stat. 850.)

Due to the alarm of the water exporters generated by regional impacts of the federal Endangered Species Act, 16 U.S.C. sections 1531-1544 (1973) and the Central Valley Project Improvement Act, Title 34 of Public Law 102-575 (1992), urban and agricultural water suppliers incredulous about the threats the two acts posed to their Delta exports, began a series of private meetings with representatives of federal and state agencies, including representatives of the Water Board, the adjudicatory body that would be required to rule impartially in the proceedings that would come. (CT 7.)[1] The San Joaquin County and Delta interests, including those petitioners representing riparian senior water right holders, were excluded from these meetings. (CT 7.) These meetings resulted in the execution of a contract referred to as the "Principles for Agreement on Bay-Delta Standards" (hereinafter "Principles Agreement"). (*Ibid;* App.154; AR Box B, item 50.)

The admitted reasoning behind the Principles Agreement was to meet the environmental needs of the Bay-Delta Estuary while avoiding reduction in exports. (App.156, paragraph 1.) In other words, the purpose was to make sure that the water required by the Endangered Species Act and most of the water required by the Central Valley Project Improvement Act for environmental purposes, to correct some of the problems created by the exports, came from somewhere other than the junior exporters. Indeed, the Principles Agreement specifically provides:

> [I]t is understood that protection of these species [threatened and endangered] shall result in no additional water cost [a mandated reduction of project supply] relative to the Bay-Delta protections embodied in the Plan. . . . (App.158, para 2(b).)

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[1] References to the record are cited in the following manner: "CT" for Clerk's Transcript; "RT" for Reporter's Transcript; and "AR" for Administrative Record.

Moreover, the Principles Agreement dictated the action to be taken by the state's Water Board, the very adjudicatory body to which the parties petitioned for the necessary changes in their permits:

> Consistent with the Framework Agreement, the SWRCB will finalize the Plan and immediately thereafter initiate water right proceedings to implement the adopted Plan. (App.159, para. 4(b).)

The Principles Agreement further sought to specify the action to be taken by the Water Board:

> Not later than three years following adoption of this Plan, the SWRCB shall assign responsibility for the following flows, together with other measures in the watershed sufficient to meet the narrative criteria, in the San Joaquin River at Vernalis among the water right holders in the watershed. (App.163, para. 1.)

and

> This process will be under the sponsorship of CUWA/AG, which commits to an open and collaborative approach involving CALFED and the environmental community. It is agreed that detailed implementation for these Principles will be finalized before publication of the final SWRCB standards, which is currently planned by March 31, 1995. (App.166, para. 6.[2])

Consistent with the Principles Agreement, the Water Board did initiate the water right proceedings and essentially adopt the operative terms thereof. (App.132-137.)

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[2] CUWA/AG is an abbreviation of California Urban Water Agency/Agricultural Water Users, and CALFED is an abbreviation of California Water Policy Council and Federal Ecosystem Directorate. (App. 154.)

B. PROCEDURAL STATEMENT

This matter arises from the Bureau and DWR's joint petition to the Water Board for changes in the permits of the Bureau and DWR in order to implement the Principles Agreement, and the Water Board's adoption of its Order Regarding Petition For Changes I. Water Rights That Authorize Diversion And Use Of Water Affecting The San Francisco Bay/Sacramento-San Joaquin Estuary, being Water Rights Order 95-6 ("WR 95-6"; App.70). WR 95-6 approved changes in the water right permits for the SWP and the CVP, authorizing the diversion and use of water affecting the San Francisco Bay/Sacramento-San Joaquin Delta Estuary. (App.132-140; CT 715-780.)

On February 28, 1995, the state's DWR filed with the Water Board a joint petition (hereinafter "Petition for Change") on behalf of itself and the Bureau as operator of the CVP pursuant to California Water Code Section 1702, requesting changes in their existing, junior appropriative water rights permits ("permits") for the SWP and CVP. (CT 546-550.) The Petition for Change requested that some thirty-nine (39) permits, all junior to the water rights of riparians and earlier appropriators, be modified. The Petition requested authority for a significant change in operations of the projects by implementation of a "joint point of diversion" allowing the Bureau and DWR to utilize each other's export pumping facilities when the other has reached its export limitation contained in their respective water right permits. The petition further sought relief from specified water export limitations previously mandated by the Water Board during the months of April and May, and sought to further modify the permits so as to parallel a Draft Water Quality Control Plan for San Francisco Bay/Sacramento-San Joaquin Delta Estuary (Bay-Delta Plan), incorporating the elements of the Principles Agreement. (App.77.) Coincidentally, the draft Bay-Delta Plan was also released by the

Water Board on December 15, 1994, the date of the Principles Agreement. (App.76.)

On April 18, 19, and 20, 1995, the Water Board held public hearings on the Petition for Change. All petitioners herein appeared at those hearings and objected to the approval of the Petition for Change. At the public hearings, DWR and the Bureau featured the Petition for Change as their joint project, and the state's DWR assumed the lead role in the presentation of their joint interests. (CT 1316-1342.)

The federal questions of concern in this matter were raised as they appeared. The first issue to arise pertains to Due Process in the adjudicatory proceedings before the Water Board, raised in the written Central Delta Water Agency, et al. Statement of Issues:

> The subject petition and hearing is a water right proceeding involving vested property and contract rights of numerous parties. These rights involve economic values of hundreds of millions of dollars. The SWRCB is expected to preside as an impartial adjudicator in these water right matters. When the State and United States are at the forefront of exporting water from the areas and watersheds of origin and are parties to this proceeding, the need for SWRCB impartiality is essential.
>
> Without SWRCB impartiality, the parties to water rights proceedings are deprived of due process of law.
>
> The task of maintaining impartiality is made even more difficult when the very same people through whom the appointments to the SWRCB are processed become involved in the matters coming before the SWRCB. The involvement of the Secretary, California Resources Agency and the Secretary for Environmental Protection, California Environmental Protection

Agency, in the "principles for agreement" is evidenced by their signature to the agreement.

Demand is hereby made that prior to commencement of the April 18, 1995, hearing, the SWRCB members and its staff make a full written disclosure to each of the parties filing notice of intent to appear as to the following:

1) All contacts with any of the parties to the "Principles For Agreement on Bay-Delta Standards Between the State of California and the Federal Government" dated December 15, 1994, pertaining to such agreement and the negotiations leading to such agreement.

2) A general description of the nature of each such contact . . .

3) As to any such contacts which involved notes, recordings or written communications, the location and times when inspection will be allowed.

4) If any such contact involved any agreement, commitment or concession as to the time, nature or disposition of any SWRCB proceeding, a written statement signed by the SWRCB member or staff person setting forth the specifics should be provided to each party.

If after such disclosure it appears that the impartiality of any SWRCB member or staff person has been compromised, then disqualification should be addressed. (AR Box E, item 314, pages 2-3.)

On June 8, 1995, the Water Board made its adjudicatory water rights decision, admitting the attendance of its staff at meetings for negotiation of the Principles Agreement, but rejecting the challenge to its impartiality and adopting Order WR 95-6 (App.91). The Water Board essentially granted the Petition for Change requested by

the Bureau and DWR, and authorized the joint points of diversion. (CT 127-191; App.132-137.)

On July 7, 1995, petitioners timely filed a Petition for Writ of Mandate in the Superior Court of California in Sacramento County, pursuant to California Code of Civil Procedure sections 1094.5, 1085, and 1060, and California Water Code section 1360 (currently Water Code section 1126). The Petition For Writ Of Mandate sought review of WR 95-6 on the grounds that the Water Board was violating various California statutes, including the California Environmental Quality Act (California Public Resources Code sections 21000, et seq.). (CT 16-35, 40-42.) Entirely independent of the challenge to the Water Board's action in adopting WR 95-6, petitioners sought a declaration by the trial court that the Water Board had an independent obligation to enforce the requirements of California Water Code Sections 11460, 12220, et seq., and 12230, et seq. (CT 48-49.)

The Thirteenth Cause of Action of the Petition For Writ Of Mandate raised the issue of the denial of Due Process in the proceeding in the Superior Court of California seeking to review the action of the Water Board:

> 143. Respondent SWRCB has deprived PETITIONERS of due process of law as follows:
>
> (a) By allowing staff, including those with direct responsibility on water right matters pertaining to WR 95-6 to participate in numerous private meetings with the water exporters and their attorneys where water allocations to meet Delta standards were discussed and where no notice was given to interested parties (including PETITIONERS) or the public.

(b) By allowing SWRCB members to receive communications pertaining to such private meetings without notice to interested parties (including PETITIONERS) or the public.

(c) By allowing staff, including those with direct responsibility on water right matters, to participate in meetings where water allocations to meet Delta standards were discussed without such meetings being duly noticed and open to the public.

(d) By failing to disclose and allow the inspection of all board and staff communications pertaining to the Principles for Agreement by all interested parties prior to the close of the evidentiary hearing on WR 95-6.

(e) By failing to allow inspection of the November 29, 1994, "Confidential" memorandum pertaining to "Delta Protection Standards" from the Chairman of the Water Policy Council to the Governor.

(f) By failing to allow for cross-examination of those staff and board members shown by the documents disclosed by the SWRCB to have participated in meetings and negotiations pertaining to said Principles for Agreement.

(g) By failing to allow for a hearing prior to decision WR 95-6 dealing with whether or not the impartiality of the SWRCB and/or staff had been compromised by the "ex parte" communications with the water exporters relating to said Principles for Agreement.

(h) Because the order, an adjudicatory action and an administrative decision, authorizes changes in terms so vague that Petitioners must guess at its meaning in order to protect their due process rights, WR 95-6 violates Article I, Section 7(a) of the California Constitution. (CT 46-48.)

On October 6, 1995, a stipulation for intervention was filed with the Superior Court naming Kern County Water Agency, Metropolitan Water District of Southern California, Santa Clara Valley Water District, Westlands Water District, and the State Water Contractors (a joint powers authority comprised of public agencies) as intervenors in the litigation. (CT 249-254.)

In the Superior Court the Bureau made a special appearance and elected not to waive its sovereign immunity. (CT 664-672; App.23.) The Water Board brought a motion for judgment on the pleadings requesting that the trial court dismiss the action on the ground that the Bureau was an indispensable party, and that in the absence of the Bureau the case should not continue and should be dismissed. (App.23; CT 688-710, 1204-1215, 1251-1261.) Petitioners then raised their concerns respecting the denial of any opportunity for review of the WR 95-6 proceedings, in the context of their Memorandum Of Points And Authorities In Opposition To Respondent's Motion To Dismiss:

> Probably the most important factor facing the Court is that if the United States is deemed an indispensable party, Petitioners will be completely denied any remedy in state or federal court on the issues raised in this case. (CT 1303.)

On January 26, 1996, the trial court heard oral arguments from the parties and the respondents argued two points. (RT 4.) First, respondents claimed that petitioners had an alternate remedy in an action pending in federal court to which some of the petitioners were parties, claiming that petitioners could pursue their state law substantive claims in the pending federal court action initiated previous to WR 95-6. (RT 4-7.) Petitioners Central Delta Water Agency, South Delta Water Agency, Reclamation District No. 2072, R.C. Farms, Inc. and Alexander Hildebrand were not parties to the federal court action and such action did not in any way review

the subject Water Board Order WR 95-6. (CT 389.) Secondly, the respondents claimed that they would suffer prejudice because of the potential for conflicting judgments should the case proceed without the United States being a party. (RT 7-9.) On February 6, 1996, the trial court granted the motion, finding the Bureau to be an indispensable party, and dismissed the action. (App.25; CT 1863-1867.) Thus, the trial court never reached the substantive issues raised in the Petition For Writ of Mandate, including the Due Process claim raised in the Thirteenth Cause of Action. The trial court did, however, determine that petitioners had an adequate remedy in the pending federal action to which the several petitioners were not even parties. (App.24; CT 1865.) Judgment dismissing the action was then entered on February 21, 1996. (App.151; CT 1868-1872.)

On April 18, 1996, petitioners filed a timely notice of appeal to the Third Appellate District of the Court of Appeal of the State of California. (CT 1885-1887.) The lack of any remedy and Due Process issues were raised in the Court of Appeal of the State of California, in Appellant's Reply Brief:

> Only in the rare occasion when the federal government elects to consent to jurisdiction, (historically when the federal and state governments are at odds) will a California State court be allowed to review such a decision. To illustrate the potential damages of sustaining this decision, if the SWRCB were to act in collusion with the federal government or in a corrupted manner, without regard to the due process rights of an individual, there would be no method by which a party could challenge such an action. The checks and balances afforded by our concept of due process would be eliminated. (Reply Brief, 2.)

and

As such, sustaining the trial court's decision effectively slams the judicial door on any other party who may be injured, eliminating their statutory right to challenge actions of the SWRCB in State court, and any due process review of decisions involving property rights." (Reply Brief, 4.)

and

A vital portion of this State regulatory scheme provides affected parties with an opportunity for judicial review of SWRCB actions in order to protect the property and due process rights of those individuals which may be affected by decisions of the SWRCB. (Water Code Sections 1360, 1705.5, 1730 and 1840) This fundamental right to judicial review cannot be merged into and subsumed by a distinct dispute with the federal government over project operations. (Reply Brief, 8.)

and

The Appellants' claims against the SWRCB rise above the dispute of some of the Appellants with the federal government. The mere existence of this separate, albeit important, legal dispute with the United States in federal court is being used by the SWRCB as both a shield to provide absolute immunity for their own actions and a sword to deprive Appellants of access to the judicial system. (Reply Brief, 8.)

and

Such a result would appoint the United States gatekeeper to State court review. In order to obtain the statutory and due process right to review, a property rights holder would have to obtain approval of the United States as well. The gatekeeper would have to determine if, in that

> instance, it wished to waive or enforce its sovereign immunity. Affording the federal government such *de facto* veto over a State court's jurisdiction to review and protect fundamental property rights undermines the practical and legal meaning of such rights. (Reply Brief, 31.)

The decision of the Court of Appeal of the State of California affirming the trial court's decision filed on May 6, 1997 (App.2.), did not specifically address the Due Process claim, but did address the lack of a remedy. The Court of Appeal determined that the lack of any remedy was but one of the factors to be considered in determining if the action should be dismissed, that it was not an outcome determinative factor, and that the Court was not convinced that petitioners did not have an adequate remedy in the federal proceeding to which some of the petitioners were parties. (App.16-18.) The Court of Appeal held:

> There is sufficient similarity in the general types of relief sought in the federal and state actions to support the trial court's conclusion appellants have an adequate remedy in the pending federal action. [footnote omitted] (App.18.)

In order to determine the standard of review of the trial court's determination to dismiss, due to the virtual identity of Rule 19 of the Federal Rules of Civil Procedure, and the California statute modeled after Rule 19, Code of Civil Procedure section 389, the Court of Appeal looked at the decisions of the United States Court of Appeals, and found that the standard of review was for an abuse of discretion.

The state Court of Appeal found as follows:

> In the federal courts "[a] district court's determination of indispensability under [Federal Rule of Civil Procedure] 19(b) is reviewed for an abuse of discretion." [footnote omitted]

(*Thunder Basin Coal Co. v. Southwestern Public Service Co.* (10th Cir. 1997) 104 F.3d 1205, 1210; see also *Burka v. Aetna Life Ins. Co.* (D.C. Cir. 1996) 87 F.3d 478, 483; *Sindia Expedition, Inc. v. Wrecked and Abandoned Vessel Known as the Sindia* (3d Cir. 1990) 895 F.2d 116, 121; *Walsh v. Centeio* (9th Cir. 1982) 692 F.2d 1239, 1242.) (App. 12-13.)

In a portion of the footnote omitted from the above, the state Court of Appeal alluded to the conflict among the circuits, by virtue of the Sixth Circuit's decision that Rule 19(b) determinations are reviewed *de novo* citing *Keweenaw Bay Indian Community v. Michigan* (6th Cir. 1993) 11 F.3d 1341 at 1346. (App.13.)

The issues were further raised in the California Supreme Court in the Petition For Review:

> The resulting iniquity and loss of petitioners' rights to the due process allowed by law in obtaining review concerning their vested water rights, directly resulting from the dismissal due to the lack of an indispensable party, is not some isolated aberration limited to the circumstances of this case. Nor is it unlikely to repeat itself. (Petition for Review, 15.)

and

> It should be noted that the riparian petitioners' water rights are vested water rights, and there should be no opportunity for the impairment or prejudice to such rights without according petitioners the full measure of the protections afforded by the processes established by law. Otherwise, serious questions concerning due process are raised. (Petition for Review, 16.)

and

> By elimination of the right of review, the Bureau and DWR have virtually quashed the due process of law. (Petition for Review, 19.)

The California Supreme Court denied the petition for review without comment, so it did not specifically deal with the issues. (App.1.)

II. REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

A. INTRODUCTION.

This case comes from the highest state court in which review could be had and there do exist compelling reasons for the Court to exercise its discretion to grant a writ of certiorari. Review should be granted due to the unique nature of the underlying controversy and the potential impact of the dismissal. This case also provides the opportunity to examine the factors and equitable considerations involved when indispensable party determinations are made, and the weight to be accorded considerations of Due Process and Equal Protection. Further, the state Court of Appeal looked to the decisions of the United States Courts of Appeals for the standard of review of a trial court's dismissal due to the absence of an indispensable party, which decisions are in conflict. The state Court of Appeal thus determined the standard of review of Rule 19(b) determinations, thereby deciding an important federal question which this Court has not settled, but should settle.

This case arises during a critical period in the historical development and application of law in California. It concerns the location and operation of the world's largest reclamation project, which is operated by the federal government, and the senior water rights of petitioners who are riparians are implicated. Water is truly the most precious but often abused and taken for granted resource.

This case comes at a time when the state and federal agencies devoted to developing and managing water resources for export, and traditionally pitted against the interests of the watersheds in which the water originates, have been mandated by the Central Valley Project Improvement Act of 1992 (Public Law 102-575, sections 3401-3412, 106 Stat. 4706-4731, hereinafter "CVPIA"), the Clean Water Act (Title 33 United States Code section 1313), and the Endangered Species Act (Title 16 United States Code section 1536, hereinafter "ESA") to undo, mitigate, and alleviate the environmental damage their development and management has created. Due to the dominant role played by the federal government in the development of California's water resources, the issue of greatest concern embedded in this case is whether there is to be any review of Water Board decisions when the Bureau and the state are both interested parties. The rulings below disallowing review are abhorrent to the concepts of Due Process and Equal Protection founded on traditional notions of fair play.

This case also brings into question the procedures to be followed under state law, when the federal government is involved, pursuant to Section 8 of the Reclamation Act of 1902 and this Court's decision in *California v. United States*, 438 U.S. 645, 57 L.Ed.2d 1018, 98 S.Ct. 2985 (1978). While these questions arise in the context of the standard of appellate rule in a determination under Rule 19(b) of the Federal Rules of Civil Procedure, the predominant issue is the weight to be accorded constitutional considerations conflicting with the application of sovereign immunity, when determining whether to dismiss pursuant to Rule 19(b).

B. THE CIRCUMSTANCES OF THIS WATER RIGHTS CASE AND THE FEDERAL GOVERNMENT'S PARTICIPATION ARE SO COMPELLING AS TO WARRANT THE EXERCISE OF DISCRETION TO PROVIDE REVIEW.

This case presents circumstances which are worthy of this Court's attention. If left to stand, the proceedings below before the Water Board will be immune from review, due solely to the federal government's refusal to waive its sovereign immunity. In the world's largest reclamation project, the state and federal water exporters will have as effectively avoided judicial review of the Water Board proceedings, as if the administrative branches of government had simply closed the doors of the judicial branch, thus avoiding any checks and balances.

A truly dangerous precedent is established by allowing judicial review in a water rights proceeding to be entirely avoided by the federal government's status as an interested party, and its selective assertion of sovereign immunity. It simply is not consistent with fair play to be left to pursue only a part of an action in federal court, where there the state enjoys the immunity of the Eleventh Amendment of the United States Constitution and review of the Water Board's decision is not allowed. Such gamesmanship by the state and federal governments was certainly not what the framers had in mind at the Constitutional Convention, and it is in conflict with the determination by this Court that, pursuant to Section 8 of the Reclamation Act of 1902, federal reclamation projects must comply with state water laws except where such laws are inconsistent with congressional directives. (*California v. United States*, 438 U.S. 645, 664, 668, 673, 678-79, 98 S.Ct. 2985, 57 L.Ed.2d 1018 (1978).)

The Principles Agreement which led to this matter was, quite simply, the Bureau and DWR water exporters' response to the environmental restraints imposed upon

them by the CVPIA, ESA, and the Clean Water Act, in order to minimize any loss or reduction of their export water. While the physical method of satisfying the environmental demands for water without reducing exports is of great concern to those such as petitioners within the watershed or area of origin, what is of even greater concern is the method employed to obtain the unreviewable legal sanction of the Water Board.

California Water Code section 174 provides for the establishment of the Water Board which is to exercise adjudicatory and regulatory functions, combining the water rights and the water pollution and water quality functions of state government. The Principles Agreement represents a blatant and audacious attempt by the Bureau and DWR, as well as the other signatories thereto, to predetermine and influence the outcome of the Water Board's adjudicatory and regulatory functions. The Principles Agreement provides:

> Consistent with the Framework Agreement, the *SWRCB will finalize the Plan and immediately thereafter initiate water right proceedings to implement the adopted Plan. In implementing the Plan, the SWRCB will act* in compliance with all provisions of law which may be applicable, including, but not limited to, the water rights priority system and the statutory protections for areas of origin. (App.159, para 4(b), emphasis added; see also other quotations from the Principles Agreement previously set forth at pages 8-9.)

Thus, the Bureau and DWR, junior appropriative water rights holders, and other signatories, sought to influence and dictate the outcome of the Water Board's adjudicatory proceeding as well as its regulatory proceedings in the adoption of a Water Quality Control Plan pursuant to California Water Code sections 13140, et seq. While the significance of this event itself should not go unnoticed, nor unremedied, it truly was only the prelude to the alarming events which would unfold after the

Water Board made its subject Order: WR 95-6, almost entirely implementing the Principles Agreement.

Despite the fact that petitioners filed a timely petition for review of WR 95-6, as expressly provided for in Water Code section 1360 (currently Water Code section 1126), this action was dismissed only because it was determined that the Bureau, one of the very parties petitioning for the result of WR 95-6, was an indispensable party which would not waive its sovereign immunity from suit in state court. It is unclear whether it was by design or unwitting fortune, but the two operators of the most massive water export system in the world who themselves asked the Water Board for changes in their permits did so without risk of judicial review of a favorable decision by the Water Board. Since the two operators were both proper parties, and due to the Eleventh Amendment immunity of the state in federal court and the sovereign immunity of the federal government in state court, review could only be obtained if the Bureau would consent to suit in state court or the state would consent to suit in federal court. In this manner, the two operators effectively reduced those who have a right of review pursuant to Water Code section 1360 (currently Water Code section 1126) to only themselves.

The consequential loss of petitioners' rights to pursue the review process allowed by law to obtain review concerning their vested water rights is, should DWR and the Bureau so desire, likely to repeat itself. This is due to the substantially coordinated and joint nature and operation of the state and federal water projects which lends itself to, if it does not require by definition, joint petition whenever the state and federal governments desire to modify a permit to suit their plan of export.

The issues of law involved in this case transcend the local context and subject matter in which they arise, particularly since the decision of the state Court of Appeal is a published decision. Left alone, the decision of the state Court of Appeal will usher in not merely a novel method of avoiding judicial review in water right cases,

but in any case in which the federal government's participation is significant enough to make the federal government a necessary party. Left alone this case will be provocative of a selective avoidance of effective review, and a total undermining of the process of review not merely of proceedings before the Water Board, but also in any other proceedings before a state administrative agency performing an adjudicatory function wherein a federal agency is an interested party. By asserting sovereign immunity, the federal government can avoid review of state agency decisions in which the federal government has prevailed. The joint participation of the state and federal governments in funding everything from roads to schools may thus be completely immunized from any review of administrative agency determinations. In such event the public's confidence in those processes is placed at great risk and is in jeopardy of being lost. Under the circumstances, it is respectfully submitted that review is appropriate.

C. REVIEW SHOULD BE ALLOWED TO CONSIDER THE WEIGHT TO BE ACCORDED CONSTITUTIONAL, COMMON LAW, AND STATUTORY CONCERNS WHEN RULE 19(b) DETERMINATIONS ARE MADE.

This case exposes the need to reconcile conflict among the requirements of the United States Constitution, the common law, the Federal Rules of Civil Procedure, and the Reclamation Act of 1902. The conflict arises from the requirements of Due Process and Equal Protection, sovereign immunity, indispensable party, Rule 19(b) determinations, and the Section 8 requirement, as determined by this Court, that makes "it abundantly clear that Congress intended to defer to the substance, as well as the form, of state water law." *California v. United States*, 438 U.S. 645, at 675, 98 S.Ct. 2985, 57 L.Ed.2d 1018 (1978). Review is appropriate to resolve the weight and priorities to be accorded such requirements when they compete.

It should be noted that the riparian petitioners' water rights are vested water rights, and there should be no opportunity for the impairment or prejudice to such rights without according petitioners the full measure of the protections afforded by the processes established by law. Otherwise, petitioners are not provided with Due Process or Equal Protection of the established law. Review should be permitted because the determination to dismiss the action below due to the assertion of sovereign immunity by the United States results in an unwarranted preference for the archaic common law concept of sovereign immunity, as against the requirements of Due Process and Equal Protection set forth in the Fourteenth Amendment protecting the fundamental rights of petitioners. The common law concept of sovereign immunity is a rule derived from the concept that the king can do no wrong. But it is that very concept which provided the fodder for the American Revolution, and provided the impetus for the Declaration of Independence and the United States Constitution. When sovereign immunity collides with the Due Process and Equal Protection clauses of the Fourteenth Amendment, sovereign immunity should give way.

Although the proceedings below may have provided petitioners with due process in form, the proceedings did not provide petitioners with the substance of Due Process, and this Court has indicated that "In determining what is due process of law, regard must be had to substance, not to form." (*Chicago, B. & Q. R. Co. v. City of Chicago*, 166 U.S. 226, 235, 17 S.Ct. 581, 41 L.Ed. 979 (1897).) Although the Due Process Clause may not require appellate review after a "full and fair trial on the merits", which is what petitioners should have obtained before the Water Board, "When an appeal is afforded, however, it cannot be granted to some litigants and capriciously or arbitrarily denied to others without violating the Equal Protection Clause." *Lindsey v. Normet*, 405 U.S. 56 at 77, 92 S.Ct. 862, 31 L.Ed. 2d 36 (1972). Allowing sovereign

immunity to dictate the dismissal in this case denied petitioners the right to appeal the Water Board's decision, providing the right only to the Bureau.

In *Provident Bank & Trust Co. v. Patterson*, 390 U.S. 102, 118-119, 88 S.Ct. 733, 19 L.Ed.2d 936 (1968), this Court recognized that some factors in a Rule 19(b) determination of whether to dismiss may be so compelling by themselves as to individually dictate a result:

> The decision whether to dismiss (i.e., the decision whether the person missing is "indispensable") must be based on factors varying with the different cases, some such factors being substantive, some procedural, *some compelling by themselves*, and some subject to balancing against opposing interests. (Emphasis added.)

The interests of Due Process and Equal Protection are certainly more compelling than the interest of sovereign immunity, particularly in this case where the Bureau uses sovereign immunity merely to thwart judicial review of a state's administrative proceeding initiated by the Bureau itself. Here it can be fairly stated that the use of sovereign immunity has allowed the government to abuse its power, employing the indispensable party determination as an instrument of oppression engendering distrust.

The assertion and application of sovereign immunity in this case further conflict with the express Congressional directive in Section 8 of the Reclamation Act of 1902 requiring the federal government to acquire water rights in conformity with state law, and this Court's holding in *California v. United States*, 438 U.S. 635. The concept that control of the waters should remain subject to state law is substantially diluted, if it does not necessarily provide a directive to the federal government to comply with the full measure of controls imposed by state law, including the basic component of allowing a right of judicial review of the adjudicatory action taken by the Water Board at the behest of the Bureau. To allow

judicial review to be avoided by a party initiating a proceeding through the use of sovereign immunity by that same party is inequitable and undesirable. If Rule 19(b) is a rule of equity and good conscience, the dismissal in this case must not be allowed to stand.

In its proper perspective, this is not a case in which sovereign immunity was asserted during the preliminary stages at the trial court level, which was the adjudicatory proceeding before the Water Board. (*United States v. State Water Resources Control Bd.*, 182 Cal.App.3d 82, 113 (1986).) In reality, the Bureau acting in accordance with Section 8 of the Reclamation Act and the state's DWR themselves initiated the action to modify their permits, and the filing in the Superior Court was merely a first level appeal challenging the adjudicatory determination of the state's Water Board in WR 95-6. The Bureau thus did not assert sovereign immunity until at the stage reviewing the very matter it had joined in initiating before the Water Board.

When in Rule 19(b) determinations, either constitutional concerns or congressional directives are in conflict with sovereign immunity, a singular compelling circumstance is present and should weigh in favor of the requirements of the Constitution, and the directives of Congress. This case presents an opportunity to clarify the weight to be accorded various concerns when considering dismissal in a Rule 19(b) case.

D. REVIEW SHOULD BE ALLOWED IN ORDER TO RESOLVE CONFLICT AMONG THE CIRCUITS AS TO THE STANDARD OF REVIEW IN RULE 19(b) DETERMINATIONS.

The state Court of Appeal determined that the Sixth Circuit of the federal Court of Appeals has "explicitly subjected Rule 19(b) determinations to a de novo standard" in *Keweenaw Bay Indian Community v. State*, 11 F.3d 1341, at 1346 (6th Cir. 1993). (App.13.) The District of

Columbia, Third, Ninth and Tenth Circuits, as noted by the state Court of Appeal, have taken a contrary position, reviewing for an abuse of discretion. (*Thunder Basin Coal Co. v. Southwestern Public Service Co.*, 104 F.3d 1205, 1210 (10th Cir. 1997); *Burka v. Aetna Life Ins. Co.*, 87 F.3d 478, 483 (D.C. Cir. 1996); *Sindia Expedition, Inc. v. Wrecked and Abandoned Vessel Known as the Sindia*, 895 F.2d 116, 121 (3d Cir. 1990); *Walsh v. Centeio*, 692 F.2d 1239, 1242 (9th Cir. 1982).) (App. 12-13.)

The standard of review when a Rule 19(b) determination has been made is an important question of federal law in need of settlement, since the circuits are in disagreement. Consequently, and particularly in the circumstances of this case, it is respectfully submitted that review should be ordered.

III. CONCLUSION

The weight to be accorded constitutional and statutory concerns as against sovereign immunity concerns, and the standard of review to be applied on review of an indispensable party determination under Rule 19 of the Federal Rules of Civil Procedure, and California Code of Civil Procedure section 389, are of substantial import and adequate to warrant, if not compel, review under the circumstances of this case. Here the two primary exporters of water in the State of California have been permitted to manipulate the procedural process for obtaining and modifying their junior appropriative water rights permits, using their sovereign immunities so as to deprive interested parties of the right of review and redress after the adjudicatory proceedings before the Water Board. If this is to be permitted, particularly when the compromise of the underlying proceeding is in issue, a serious flaw in our system of jurisprudence has been exposed. By elimination of the right of review, the Bureau and DWR have virtually quashed the Due Process of law and denied petitioners Equal Protection. If this result is to be sanctioned, it should be only after the scrutiny of this

Court. For all of the reasons set forth above, it is respectfully submitted that review on a writ of certiorari should be granted.

Dated: October 24, 1997

Respectfully submitted,

NOMELLINI, GRILLI & MCDANIEL
PROFESSIONAL LAW CORPORATIONS

DANTE JOHN NOMELLINI

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APPENDIX 1

Third Appellate District No. C023548
S062126

IN THE SUPREME COURT OF CALIFORNIA

(Filed Jul. 30, 1997)

COUNTY OF SAN JOAQUIN Et Al., Appellants

v.

STATE WATER RESOURCES CONTROL BOARD Et Al., Respondents

Appellants' petition for review DENIED.
Baxter, J., did not participate.

GEORGE
Chief Justice

APPENDIX 2

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

COUNTY OF SAN JOAQUIN et al., Plaintiffs and Appellants, v. STATE WATER RESOURCES CONTROL BOARD et al., Defendants and Respondents,	C023548 (Super. Ct. No. 95CS01642) (Filed May 6, 1997)
UNITED STATES OF AMERICA, ETC., et al., Real Parties in Interest and Respondents	
WESTLANDS WATER DISTRICT et al., Interveners and Respondents.	

APPEAL from a judgment of the Superior Court of Sacramento County. Thomas Cecil, Judge. Affirmed.

Jeanne M. Zolezzi, Steven A. Herum, Karna E. Harrigfeld, Neumiller & Beardslee, John Herrick, Brewer, Patridge, Gerlomes & Herrick, Thomas M. Zuckerman, Reid Roberts, Roberts & Roberts, Dante John Nomellini,

Daniel A. McDaniel, and Nomellini, Grilli & McDaniel, for Plaintiffs and Appellants, County of San Joaquin et al.

Daniel E. Lungren, Attorney General, Roderick E. Walston, Chief Assistant Attorney General, Charles W. Getz IV, Assistant Attorney General, Clifford T. Lee and Linus Masouredis, Deputy Attorneys General, and Barbara Leidigh, for Defendants and Respondents, State Water Resources Control Board et al.

Maria A. Iiuzuka, for Real Party in Interest and Respondent, United States of America, etc.

Susan N. Weber, David B. Anderson, David A. Sandino, Daniel J. O'Hanlon, and Beveridge & Diamond, for Real Party in Interest and Respondent, Department of Water Resources.

Thomas W. Birmingham, William T. Chisum, and Kronick, Moskovitz, Tiedemann & Girard, for Intervener and Respondent, Westlands Water District.

Eric Garner, Best, Best & Krieger, and James Roberts, for Intervener and Respondent, Metropolitan Water District.

Diane V. Rathmann, and Linneman, Burgess, Telles, Van Atta & Vierra, for Interveners and Respondents, San Luis Water District and Panoche Water District.

Kevin Haroff and Morrison & Foerster, for Intervener and Respondent, Santa Clara Water District.

In this dispute, established water users challenge restrictions imposed under new federal standards for water quality and wildlife protection. The trial court found the United States Bureau of Reclamation was an

indispensable party and dismissed the action after the Bureau refused to waive its sovereign immunity. The plaintiffs appeal on equitable grounds; we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The United States Bureau of Reclamation (Bureau) operates the Central Valley Project, the country's largest water reclamation project. "The Sacramento Valley, containing the Sacramento River, lies in the northern portion of the Central Valley, and the San Joaquin Valley, containing the San Joaquin River, lies in the southern portion. The Sacramento River has a surplus of water because of heavier rainfall in the northern region. . . . The San Joaquin River, in contrast, does not supply sufficient water for the extensive amount of tillable soil in its valley. The [Central Valley Project] transports some of the Sacramento River's surplus water to the San Joaquin Valley and permits the waters of the San Joaquin River to be diverted for irrigation and other purposes to new areas where water is scarce." (*South Delta Water Agency v. Department of Interior* (9th Cir. 1985) 767 F.2d 531, 534.) The Bureau operates the Central Valley Project under water rights permits from the California State Water Resources Control Board.

California's Department of Water Resources operates the State Water Project. The principal facilities of this project include the Oroville Dam, the Delta Pumping Plant, and the California Aqueduct. (Wat. Code, §§ 12930 et seq.) The State Water Project also releases previously stored water to the Delta and rediverts it. The Department of Water Resources, like the Bureau, operates this

project under permits from the State Water Resources Control Board.

This action concerns the allocation of water impounded by the Bureau at the New Melones Dam on the Stanislaus River, which is part of the Central Valley Project. (See *California v. United States* (1978) 438 U.S. 645, 651 [57 L.Ed.2d 1018, 1024].) The Bureau uses this water to provide fish and wildlife restoration flows on the San Joaquin River, and control water quality standards.

On June 8, 1995, the State Water Resources Control Board adopted Water Rights Order 95-6 (WR 95-6), which approved changes in the water rights permits for both the State Water Project and the Central Valley Project.[1] On July 7, 1995, the County of San Joaquin, Stockton East Water District, Central San Joaquin Water Conservation District, Central Delta Water Agency, South Delta Water Agency, Reclamation District No. 2072, R.C. Farms, Inc., and Alexander Hildebrand (collectively, "appellants"), filed a petition for writ of mandate, contending the use of New Melones water for fish and wildlife restoration and water quality violates California water laws and denies the appellants their priority rights. Some appellants hold

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[1] These changes modified the water quality standards for striped bass spawning, the Suisun Marsh, export rates, and operations of the Delta Cross Channel facilities. The changes also permit the Bureau and the Department of Water Resources to use each other's pumping facilities when one has reached its export limitation in order to improve fish protection. WR 95-6 also modified requirements for operating the New Melones Reservoir with respect to the salinity water quality standard for Vernalis, which is the point at which the San Joaquin River enters the Delta.

water supply contracts with the Bureau for New Melones water; other appellants otherwise claim riparian rights on the San Joaquin River or the Sacramento-San Joaquin River Delta. The petition for writ of mandate contained 14 causes of action, all of which challenged WR 95-6 and sought to modify the Bureau's Central Valley Project operations.[2] The petition asserted violations of the California Environmental Quality Act and the California Water Code.

Appellants' petition named as respondents the State Water Resources Control Board and the five individual Board members, and named, as real parties in interest, the United States through the Bureau and the State of California through the Resources Agency and the Department of Water Resources. Subsequently, the Kern County Water Agency, the Metropolitan Water District of Southern California, Santa Clara Valley Water District, Westlands Water District, and the State Water Contractors intervened as respondents.

The State Water Resources Control Board moved for judgment on the pleadings arguing the Bureau was an indispensable party, which required dismissal of the action. At the hearing on this motion, the Bureau specially appeared and elected not to waive its sovereign

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[2] Appellants sought (1) to "set aside, vacate, and rescind" WR 95-6; (2) priority of their interests to water stored in and delivered from the Central Valley Project's New Melones Reservoir over others' interests in the water; (3) to limit the export of Central Valley Project water; and (4) to impose additional environmental mitigation requirements on the Central Valley Project.

immunity. In a detailed ruling, the trial court found the Bureau was an indispensable party and thus dismissed the action without prejudice.

DISCUSSION

The sole issue presented in this appeal is whether the trial court erred in finding the Bureau was an indispensable party, thereby necessitating dismissal of this action. Contrary to appellants' assertion, we review the trial court's determination pursuant to Code of Civil Procedure section 389, subdivision (b), for an abuse of discretion, and find no basis for reversal.[3]

Section 389 provides: "(a) A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. [¶] (b) If a person as described in paragraph (1) or (2) of subdivision (a) cannot be made a party, the court shall determine whether in equity and good

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[3] All further undesignated statutory references are to the Code of Civil Procedure.

conscience the action should proceed among the parties before it, or should be dismissed without prejudice, the absent person being thus regarded as indispensable. The factors to be considered by the court include: (1) to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; (2) the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; (3) whether a judgment rendered in the person's absence will be adequate; (4) whether the plaintiff or cross-complainant will have an adequate remedy if the action is dismissed for nonjoinder."

Section 389 first sets out, in subdivision (a), a definition of persons who ought to be joined if possible (sometimes referred to as "necessary" parties). Then, subdivision (b) sets forth the factors to follow if such a person cannot be made a party in order to determine "whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed without prejudice, the absent person being thus regarded as *indispensable*." (Italics added.) The subdivision (b) factors "are not arranged in a hierarchical order, and no factor is determinative or necessarily more important than another." (See 4 J. Moore, Moore's Federal Practice ¶19.05[1][a] (3d ed. 1997).)

Here, no one disputes the United States is a party which should be joined if possible under section 389. subdivision (a). Therefore, the case turns on whether the trial court properly applied the factors set forth in section 389, subdivision (b). The trial court expressly found *all*

four factors indicated this action should not proceed without the United States. As the trial court's ruling noted: "It is clear that the Bureau, named as a Real Party in Interest, falls within the purview of paragraph (2) of section 389(a). It is also clear that the Bureau is not amenable to this Court's jurisdiction and has refused to waive its sovereign immunity. This Court must therefore apply the four factors listed in subdivision (b) of section 389 to determine whether, in equity and good conscience, the action should proceed without the Bureau. [¶] The four factors listed in section 389(b) were briefed and argued at length by the parties. The Court finds as follows: [¶] 1. Petitioners' requested relief would substantially prejudice the Bureau's rights. The water rights order which petitioners seek to vacate (WR 95-6) modifies the Bureau's existing water right permits for the Central Valley Project ("CVP"). To set aside that order would strip the Bureau of many of its current permit rights and impede the Bureau's CVP operations; [¶] 2. The Court concurs with respondents that *Sierra Club, Inc. v. California Coastal Commission* [citation] is controlling [because "set[ting] aside, vacat[ing], and rescind[ing]" the Bureau's permit "would directly affect, and undoubtedly injure," the Bureau's interests]; [¶] 3. The Court cannot grant petitioners' prayer and then tailor it in such a fashion to protect against prejudice to the Bureau. Contrary to petitioners' claim, the impact upon the Bureau would not be 'minor' and would, in fact, seriously disrupt its operations; [¶] 4. A judgment rendered in the Bureau's absence would not be adequate. Three of the petitioners have filed suit against the Bureau in federal court. That action involves

some of the same issues raised in the instant case. Given the overlapping issues in the two courts, a judgment in this case, without the Bureau's presence, could result in contradictory legal obligations and generate further litigation among the parties and/or real parties in interest; [¶] 5. Petitioners have an adequate remedy in the pending federal action. While not all issues will be addressed, the Court concurs with respondents' analysis in terms of the focus of the relief requested by petitioners. In that vein, the federal action can remedy the alleged misconduct; and [¶] 6. Given the nature of the rights and responsibilities involved, the Bureau's interests cannot be adequately represented by the State of California. The Bureau and the State have different water rights, own and operate different project facilities, and are governed by different laws and regulations. Moreover, WR 95-6 modifies the water right permits of the Bureau and State in different respects. Consequently, each entity is affected differently by that order. . . . [The court therefore] rule[s] that the United States Bureau of Reclamation is an indispensable party to this litigation under Code of Civil Procedure section 389 which cannot be joined in this action because of the sovereign immunity of the United States. . . . This action shall be, and hereby is, dismissed without prejudice. . . . "

Since the trial court reviewed the propriety of the United States' participation in this action pursuant to the factors and considerations set forth in section 389, appellants attempt a "second bite at the apple" by claiming the law is "well-settled" we must review this determination de novo, citing *Save Our Bay, Inc. v. San Diego Unified Port*

Dist. (1996) 42 Cal.App.4th 686.[4] *Save Our Bay* indeed subjects such a determination to de novo review, which we find contrary to the available authority.

We first note the language of subdivision (b), section 389, refers to a determination "in equity and good conscience." "[T]he decision whether to proceed with the action in the absence of a particular party is one *within the court's discretion*, as governed by the various factors enumerated in subdivision (b) of section 389, Code of Civil Procedure." (*Sierra Club, Inc. v. California Coastal Com.* (1979) 95 Cal.App.3d 495, 500, italics added; see also *Serrano v. Priest* (1976) 18 Cal.3d 728, 753 ["in dealing with the doctrine of indispensable . . . parties we should . . . be careful to avoid converting a *discretionary power* or a rule of fairness in procedure into an arbitrary and burdensome requirement which may thwart rather than accomplish justice"], italics added, citations, internal quotation marks, and fn. omitted; *Kraus v. Willow Park Public Golf Course* (1977) 73 Cal.App.3d 354, 368 ["[i]t is for *discretionary and equitable reasons*, not for any want of jurisdiction, that the court may decline to proceed without the absent party"], italics added.) It makes no sense to grant the trial court an expressly discretionary power to balance the equities, then reject the court's evaluation out of hand and balance the equities anew.

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[4] Appellants also cite *Cox v. County of San Diego* (1991) 233 Cal.App.3d 300, 306, probably because this was the authority cited by *Save Our Bay*. (*Save Our Bay, Inc. v. San Diego Unified Port District, supra*, 42 Cal.App.4th at p. 692.) However, *Cox* did not address section 389 or indispensable parties; *Cox* involved a grant of summary judgment.

We additionally note the California Legislature amended section 389 in 1971 to conform to rule 19 of the Federal Rules of Civil Procedure. (Law Revision Com. comment, Code Civ. Proc., § 389 ["[s]ection 389 is revised to substitute practically in its entirety Rule 19 of the Federal Rules of Civil Procedure for former Section 389. The words 'without prejudice' have been added to the language of the Federal Rule in subdivision (b) of Section 389 merely to avoid any contrary implication that might be created by the omission of the somewhat similar provision formerly found in Section 389. . . . Accordingly, the explanatory note prepared by the Advisory Committee in conjunction with the amendment of Rule 19 in 1966 is particularly helpful in describing the nature and effect of Section 389"]; see also *Serrano v. Priest, supra,* 18 Ca1.3d at p. 753, fn. 27 [section 389 was "enacted in 1971 to conform ours to the federal practice. . . ."].

Due to the amendment of section 389 to conform to Federal Rule 19, the California courts have noted the propriety of using federal precedents "as a guide to application of the statute." (See *Kraus v. Willow Park Public Golf Course, supra,* 73 Cal.App.3d at p. 368, fn. 9, citation and internal quotations omitted; *Conrad v. Unemployment Ins. Appeals Bd.* (1975) 47 Cal.App.3d 237, 241.) In the federal courts, "[a] district court's determination of indispensability under [Federal Rule of Civil Procedure] 19(b) is reviewed for an abuse of discretion."[5] (*Thunder*

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[5] The instant case implicates the standard of review only as to subdivision (b) of section 389, and by analogy, Rule 19(b) of the Federal Rules of Civil Procedure. This case does not raise, and we do not address, the appropriate standard of review for

Basin Coal Co. v. Southwestern Public Service Co. (10th Cir. 1997) 104 F.3d 1205, 1210; see also *Burka v. Aetna Life Ins. Co.* (D.C. Cir. 1996) 87 F.3d 478, 483; *Sindia Expedition, Inc. v. Wrecked and Abandoned Vessel Known as the Sindia* (3d Cir. 1990) 895 F.2d 116, 121; *Walsh v. Centeio* (9th Cir. 1982) 692 F.2d 1239, 1242.)

The determinations under subdivision (b) "must be based on fact-specific considerations. [Citation.] These determinations are anything but pure legal conclusions. . . . [T]hey involve the balancing of competing interests and must be steeped in 'pragmatic considerations.' " (*Travelers Indemn. Co. v. Dingwell, supra,* 884 F.2d at p. 635.) The latitude inherent in subdivision (b) renders the determination "more in the arena of a factual determination than a legal one." (*Envirotech Corp. v. Bethlehem Steel Corp.* (2d Cir. 1984) 729 F.2d 70, 75.) "The rule calls for a pragmatic decision based on practical considerations in the context of a particular litigation. . . . [T]he district court has substantial discretion in considering which factors to weigh and how heavily to emphasize certain considerations in deciding whether the action should go forward." (*Kickapoo Tribe of Indians v. Babbitt*

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determinations under subdivision (a) of section 389. (See *Travelers Indemn. Co. v. Dingwell* (1st Cir. 1989) 884 F.2d 629, 635 [some courts have questioned whether Rule 19(a) determinations are reviewed de novo, but "[n]o Circuit has explicitly decided to review Rule 19(b) determinations under a de novo standard of review"].) Since the *Dingwell* decision, it appears only the Sixth Circuit, which *Dingwell* characterized as indicating "no preference" as to the appropriate standard of review, has explicitly subjected Rule 19(b) determinations to a de novo standard. (See *Keweenaw Bay Indian Community v. Michigan* (6th Cir. 1993) 11 F.3d 1341, 1346.)

(D.C. Cir. 1995) 43 F.3d 1491, 1495, internal quotation marks omitted.) The trial judge, who is "closer to the arena," is usually better situated than an appellate panel "to survey the practicalities involved in the litigation." (*Walsh v. Centeno, supra,* 692 F.2d at p. 1242.) " 'The [district] court's trial management "should not be impeded by second guessing at the appellate level except in those rare instances when a clear abuse of discretion is firmly shown." ' " (*Interspiro USA, Inc. v. Figgie Intern., Inc.* (Fed. Cir. 1994) 18 F.3d 927, 932, citations omitted.)

Accordingly, we review the trial court's determination for an abuse of discretion, and find none. Appellants, at least implicitly, acknowledge the trial court evaluated the section 389, subdivision (b), factors. However, appellants attempt to "retry" their case on appeal, asking us to reweigh subdivision (b)'s discretionary factors in order to yield a different result. In essence, appellants' brief explains how the discretionary factors *could* be balanced to permit their lawsuit to proceed, but have not demonstrated why these factors *must* be balanced in this fashion. Appellants have not shown why the trial court, by balancing the requisite factors and reaching a different result, i.e. concluding the action should not proceed, thereby abused its discretion.

By their own characterization, appellants deem as "the most important fact" the potential denial of a remedy. However, in reading appellants' arguments closely, appellants do not claim they are otherwise "without a remedy," but merely fear they *could be* without a remedy should challenges to the federal proceedings prevail. Citing *Vanoni v. County of Sonoma* (1974) 40 Cal.App.3d 743, appellants attempt to recast the case law to render the

remedy factor dispositive, stating the "inadequacy of a remedy in state court *alone* is sufficient justification for a court to hold that in 'equity and good conscience' the action should proceed without the United States."[6] (Italics in original.) However, appellants fail to note a trial court's determination whether in "equity and good conscience" an action should proceed or should be dismissed is based on the particular facts posed in a particular case after evaluating all of the subdivision (b) factors. Depending on the particular case, a trial court might well decide although three factors favor dismissing the action, the strength of a fourth factor indicates the action should proceed – or vice versa. This, however, is not such a case.

Section 389, subdivision (b), leaves the judge "with substantial discretion in considering which factors to weigh and how heavily to emphasize certain considerations in deciding whether the action should go forward in the absence of someone needed for a complete adjudication of the dispute." (See 7 C. Wright, A. Miller & M. Kane, Federal Practice and Procedure (2d ed. 1986) § 1604, p. 66.) Under appellants' interpretation, the unavailability (or in appellants' instance, the possible unavailability) of an alternative forum would always be

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[6] *Vanoni* is less than compelling authority in this regard. *Vanoni*'s analysis, in its entirety, reads as follows: "[A]ppellants here would be left with no remedy in the state courts if their action were dismissed for nonjoinder of the United States. Because section 389 of the Code of Civil Procedure directs that one factor to be considered by the court is whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder, 'equity and good conscience' suggest that the action should proceed." (*Id.* at p. 747.)

determinative, outweighing the other three statutory considerations. This is not the law. (See *Quileute Indian Tribe v. Babbitt* (9th Cir. 1994) 18 F.3d 1456, 1460 ["although there exists no alternative forum. . . . , that factor alone does not outweigh the other three factors"] ; *Shermoen v. United States* (9th Cir. 1992) 982 F.2d 1312, 1319 [accord]; *Confederated Tribes of Chehalis Indian Reservation v. Lujan* (9th Cir. 1991) 928 F.2d 1496, 1500 ["lack of an alternative forum does not automatically prevent dismissal of a suit"].)

The availability of an "adequate remedy" is one, but only one, factor which the trial court evaluates in making its determination. Each case turns on its facts. To deem the unavailability of an alternative forum a conclusive factor in all cases and circumstances would, in effect, rewrite the statute, because the statute directs the court to consider all four factors in making this determination. (Cf. *Piper Aircraft Co. v. Reyno* (1981) 454 U.S. 235, 249-250 [70 L.Ed.2d 419] [discussing the factors considered for forum non conveniens and concluding, "[w]e [will] not lay down a rigid rule to govern discretion. . . . If central emphasis were placed on any one factor, the . . . doctrine would lose much of the very flexibility that makes it so valuable"] .)

Moreover, in this case, we are not convinced appellants lack an alternative forum.[7] The trial court found:

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[7] Appellants complain they may lack an alternative forum because they cannot bring precisely the same claims in the federal court. This is not the standard. As the trial court's ruling acknowledges, appellants cannot bring all of the same claims in the federal case. However, the standard is whether appellants

"Three of the petitioners have filed suit against the Bureau in federal court. That action involves some of the same issues raised in the instant case. . . . Petitioners have an adequate remedy in the pending federal action. While not all issues will be addressed, the Court concurs with respondents' analysis in terms of the focus of the relief requested by petitioners. In that vein, the federal action can remedy the alleged misconduct."

The record contains the complaint filed in the federal action. This complaint alleges the Bureau "reallocate[d] 200,000 acre feet from the New Melones Unit, directly taking the water from users on the Stanislaus River in favor of uses and purposes in the California Central Valley," "did not require any releases or bypass flows from other CVP projects capable of releasing water to the San Joaquin River and continued to export water for uses in the Central Valley during the period of reallocation from the New Melones Project. [The Bureau] ignored and failed and refused to consider allocating water from other CVP projects capable of releasing water to reach the San Joaquin River and the Sacramento/San Joaquin Bay-Delta Estuary." The complaint also alleges the Bureau "reallocat[ed] . . . approximately 127,000 acre-feet from the New Melones Unit for the purpose of benefitting fish and wildlife and for the use of this water outside of the place of use provided for in the permits issued for the New

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have an "adequate remedy," not whether all issues are identical. As discussed herein, the federal case challenges the Bureau's Central Valley Project operations and seeks to change the Bureau's operations of New Melones and the Central Valley Project to make more water available to appellants, which is the same general type of relief sought in the instant case.

Melones Unit. . . . " Among the fourteen remedies sought in the prayer for relief are temporary, preliminary, and permanent injunctions prohibiting the BUREAU from depriving [plaintiffs] of their vested rights to a supply of water and "prohibiting . . . the BUREAU from *reallocating water from the New Melones Project* under the CVPIA to any purpose of use or place of use outside of the purpose or place *authorized by the permits issued by the California State Water Resources Control Board* and to prohibit [the Bureau] from storing or refusing to release water [for any use] not authorized by the current purpose of use or outside the place of use *authorized by said permits*. . . . " (Italics added.)

There is sufficient similarity in the general types of relief sought in the federal and state actions to support the trial court's conclusion appellants must have an adequate remedy in the pending federal action.[8]

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[8] Referring to matters outside the record, appellants argue they lack an adequate remedy in the federal court action because the State subsequently asserted Eleventh Amendment immunity against new complaints filed by appellants both in that federal court action and in a new federal court lawsuit. Appellants filed these new complaints *after* the trial court dismissed the instant action. The trial judge is not Nostradamus, nor is the trial judge expected to monitor the various federal court actions and reevaluate indispensable party determinations to guarantee appellants a perfect alternative forum. The trial court evaluates the four factors as they exist at a particular point; there are no ironclad assurances, nor could there be. An alternative forum could fail to provide a remedy for any number of substantive or procedural reasons. This is not to say the lack of an "adequate remedy" in federal court is insignificant; indeed in some instances the state trial court may conclude the lack of an alternative forum outweighs

In appellants' two remaining arguments, they again attempt to "retry" their case: Appellants contend the Bureau need not be joined because "an adverse judgment will not prejudice the United States,"[9] the other defendants can "ably argue in the interests of the [Bureau], because the affect [*sic*] of the relief would be the same on both parties,"[10] and "relief may be shaped to avoid any

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the other three factors set forth in section 389, subdivision (b). However, as explained above, the trial court's determination pursuant to section 389, subdivision (b), involves the balancing of competing considerations at a particular point in time. No one factor is conclusive under all circumstances, and the determination is not revisited in light of subsequent events.

[9] As part of this argument, appellants contend: "The trial court incorrectly concluded that should the Appellants[ ] receive the requested relief, vacating WR 95-6, it would result in stripping the Bureau of many of its current permit rights and impede the Bureau['s] CVP operation." Appellants characterize the trial court's error as failing to recognize "[w]ithout the modifications to the permit, the operations of the CVP and SWP would continue, unchanged." If appellants lost, thereby leaving WR 95-6 intact, the Bureau's operations would continue unchanged. However, if appellants prevailed, thereby rescinding WR 95-6, the Bureau would lose certain rights under the permits. We cannot deem the loss of current rights as nonprejudicial simply because the Bureau would not lose all water rights but would instead revert back to the rights it held previously.

[10] Appellants point to various similarities regarding the application of particular provisions in WR 95-6 to the Bureau and the State, and similarities in export pumping restrictions. Appellants also note: "While the parties operate separately owned facilities, they also jointly own facilities which are operated according to a formal written coordinated operating agreement." However, the trial court expressly found: "The Bureau and the State have different water rights, own and

prejudice caused to the United States."[11] The trial court conscientiously examined these factors, and reached exactly the opposite conclusions. Appellants' argumentative contentions are simply inadequate bases for reversal of the trial court's reasoned balancing of the discretionary factors.[12]

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operate different project facilities, and are governed by different laws and regulations. Moreover, WR 95-6 modifies the water right permits of the Bureau and State in different respects. Consequently, each entity is affected differently by that order." The trial court clearly found the differences outweighed the similarities, and we defer to this finding.

[11] In this argument, appellants contend the Bureau "will be able to protect its 'direct' interest in the permits in any subsequent hearing on the Petition for Change." This has no bearing on the ability of the Bureau to protect its interests in the instant litigation. If appellants were to prevail, the Bureau would suffer a restriction on now-existing rights. The fact it might regain those rights after subsequent hearings is not a manner in which the trial court can tailor relief, i.e. upholding or rescinding WR 95-6. *Appellants sought relief directly against the Bureau.* The petition prayed for preliminary and permanent injunctions "restraining . . . Real Parties in Interest." By seeking to invalidate WR 95-6, appellants sought to take away changes to the Bureau's water rights permits, which directly affect the operations of the Central Valley Project. Appellants' assertions an adverse judgment would not prejudice the Bureau are preposterous.

[12] Two additional arguments posed in appellants' opening brief require brief mention. Appellants assert the Bureau "holds only legal title to the water" and "has no substantial interest in the water," emphasizing the Bureau "uses no water." The argument is highly misleading: the fact the Bureau does not consume water is not synonymous with having no substantial interest in the water. The Bureau has appropriative water rights in the Central Valley Project. (*United States v. State Water Resources Control Bd.* (1986) 182 Cal.App.3d 82, 106.) The Bureau

DISPOSITION

The judgment is affirmed. Respondents shall recover their costs on appeal. (*CERTIFIED FOR PUBLICATION.*)

NICHOLSON, J.

We concur:

SPARKS, Acting P.J.

MORRISON, J.

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owns the CVP facilities, has operational control and responsibilities relating to flood control, water supply, power generation, and fish and wildlife mitigation. The Bureau has substantial property rights in its water rights permits, whereby the Bureau diverts, transports, and stores water. The Bureau clearly has a substantial interest in this litigation.

Appellants also essentially seek to create a new, determinative, factor. They argue: "In instances where the [indispensable party] rule has been applied [to dismiss an action], plaintiffs have typically failed to provide an acceptable excuse for *slow and negligent conduct in naming the defendants or real parties in interest.* Here, in contrast, the Appellants timely named the United States. . . . " (Italics added.) The only case cited for this proposition is *Sierra Club, Inc. v. California Coastal Com., supra,* 95 Cal.App.3d 495. *Sierra Club* did not employ timeliness as an additional factor. Rather, timeliness was an issue in *Sierra Club* because the plaintiff failed to join a particular individual before the statute of limitations ran, and thus the individual "could not be made a party" to the action. (*Id.* at p. 502; see § 389, subd. (b) ["[i]f a person as described in paragraph (1) or (2) of subdivision (a) cannot be made a party, the court shall determine whether in equity and good conscience. . . . "].)

APPENDIX 3

COUNTY OF SAN JOAQUIN, STOCKTON EAST WATER DISTRICT, CENTRAL SAN JOAQUIN WATER CONSERVATION DISTRICT, CENTRAL DELTA WATER AGENCY, SOUTH DELTA WATER AGENCY, RECLAMATION DISTRICT NO. 2072, R.C. FARMS, INC. and ALEXANDER HILDEBRAND,

Petitioners,

vs.

STATE WATER RESOURCES CONTROL BOARD; JOHN P. CAFFREY; MARC DEL PIERO; JAMES M. STUBCHAER; MARY JANE FORSTER; JOHN W. BROWN; AND DOES 1 through 10, inclusive,

Respondents.

UNITED STATES OF AMERICA, acting by and through the DEPARTMENT OF THE INTERIOR, BUREAU OF RECLAMATION; STATE OF CALIFORNIA, acting by and through the RESOURCES AGENCY, DEPARTMENT OF WATER RESOURCES; and DOES 11 THROUGH 300.

Real Parties In Interest.

_____/

No. 95 CS 01642

RULING ON SUBMITTED MATTER

This matter came on regularly for hearing on Respondents' Motion for Judgment on the pleadings on January 26, 1996, in Department 7 of the Sacramento Superior Court, the Honorable Thomas M. Cecil presiding. Following arguments from counsel, the Court deemed the matter submitted.

The underlying issues pending before this Court are significant. Respondents' present motion, however, only concerns whether the United States Bureau of Reclamation ("Bureau") is an indispensable party to this litigation under Code of Civil Procedure section 389, thereby necessitating dismissal of the action.

It is clear that the Bureau, named as a Real Party in Interest, falls within the purview of paragraph (2) of section 389(a). It is also clear that the bureau is not amenable to this Court's jurisdiction and has refused to waive its sovereign immunity. This Court must therefore apply the four factors listed in subdivision (b) of section 389 to determine whether, in equity and good conscience, the action should proceed without the Bureau.

The four factors listed in section 389(b) were briefed and argued at length by the parties. The Court finds as follows:

1. Petitioners' requested relief would substantially prejudice the Bureau's rights. The water rights order which petitioners seek to vacate (WR 95-6) modifies the Bureau's existing water right permits for the Central Valley project ("CVP"). To set aside that order would strip the Bureau of many of its current permit rights and impede the Bureau's CVP operations;

2. The Court concurs with respondents that *Sierra Club, Inc. v. California Coastal Commission* (1979) 95 Cal.App.3d 495 is controlling;

3. The Court cannot grant petitioners' prayer and then tailor it in such a fashion to protect against prejudice to the Bureau. Contrary to petitioners' claim, the impact upon the Bureau would not be "minor" and would, in fact, seriously disrupt its operations;

4. A judgment rendered in the Bureau's absence would not be adequate. Three of the petitioners have filed suit against the bureau in federal court. That action involves some of the same issues raised in the instant case. Given the overlapping issues in the two courts, a judgment in this case, without the Bureau's presence, could result in contradictory legal obligations and generate further litigation among the parties and/or real parties in interest;

5. Petitioners have an adequate remedy in the pending federal action. While not all issues will be addressed, the Court concurs with respondents' analysis in terms of the focus of the relief requested by petitioners. In that vein, the federal action can remedy the alleged misconduct; and

6. Given the nature of the rights and responsibilities involved, the Bureau's interests cannot be adequately represented by the State of California. The Bureau and the State have different water rights, own and operate different project facilities, and are governed by different laws and regulations. Moreover, WR 95-6 modifies the water right permits of the Bureau and State in different

respects. Consequently, each entity is affected differently by that order.

Accordingly, even after engaging in a balancing of interests as urged by petitioners, the Motion for Judgment on the Pleadings is granted. The matter is dismissed without prejudice. Respondents are directed to prepare an appropriate order, submit it to opposing counsel for approval as to form, and file it with this Court.

Counsel for Petitioners are hereby notified that upon the passage of 60 (sixty) days from the signing of this order, the 18 (eighteen) cartons of administrative records lodged with this Court on January 12, 1996, now in the Court's possession, be retrieved by counsel or they will be destroyed by the Court.

/s/ Thomas M. Cecil
JUDGE OF THE
SUPERIOR COURT
Thomas M. Cecil
[seal]

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APPENDIX 4

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

In the Matter of Petition for Changes in the Water Rights Authorizing Diversion and Use of Waters in the Watershed of the Sacramento-San Joaquin Delta, held by **CALIFORNIA DEPARTMENT OF WATER RESOURCES** and **UNITED STATES BUREAU OF RECLAMATION**	ORDER: WR 95-14

ORDER DENYING PETITIONS FOR RECONSIDERATION OF ORDER WR 95-6, WHICH APPROVED CHANGES IN THE WATER RIGHTS OF THE CALIFORNIA DEPARTMENT OF WATER RESOURCES AND THE UNITED STATES BUREAU OF RECLAMATION AFFECTING THE BAY-DELTA ESTUARY

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STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

In the Matter of Petition for Changes in the Water Rights Authorizing Diversion and Use of Waters in the Watershed of the Sacramento-San Joaquin Delta, held by **CALIFORNIA DEPARTMENT OF WATER RESOURCES** and **UNITED STATES BUREAU OF RECLAMATION**	ORDER: WR 95-

ORDER DENYING PETITIONS FOR RECONSIDERATION OF ORDER WR 95-6, WHICH APPROVED CHANGES IN THE WATER RIGHTS OF THE CALIFORNIA DEPARTMENT OF WATER RESOURCES AND THE UNITED STATES BUREAU OF RECLAMATION AFFECTING THE BAY-DELTA ESTUARY

BY THE BOARD:

1.0 INTRODUCTION

On June 8, 1995 the State Water Resources Control Board (SWRCB) adopted Order WR 95-6. Order WR 95-6 approved, in part, a petition for changes filed by the California Department of Water Resources (DWR) and the United States Bureau of Reclamation (USBR). The approved changes include changes in the standards to be met by the DWR and the USBR for striped bass spawning salinities, Suisun Marsh salinities, export rates in the southern Delta, and operation of the Delta Cross Channel Gate; a change in the salinity to be maintained by the USBR at Vernalis on the San Joaquin River; and a limited authorization for the USBR and the DWR to use each other's water diversion points in the southern Delta. In the absence of a further order of the SWRCB, these changes will expire on December 31, 1998.

On July 10, 1995, the SWRCB received three timely petitions for reconsideration. A single petition was jointly filed by several persons and entities located in San Joaquin County, including the County of San Joaquin (County), Stockton East Water District (SEWD), Central San Joaquin Water Conservation District (CSJWCD) Central Delta Water Agency (CDWA), South Delta Water

Agency (SDWA), Reclamation District No. 2072 (Reclamation District), R.C. Farms, Inc. (R.C. Farms), and Alexander Hildebrand (Hildebrand) (collectively, these parties are referred to herein as San Joaquin). The other two petitions were filed by Patrick J. Porgans (Porgans) and by a group designated as Certain Area I Representatives and Other Area I Landowners (Area I) within the Westlands Water District.

2.0 GROUNDS FOR RECONSIDERATION

The SWRCB may order reconsideration on all or a part of a decision or order adopted by the SWRCB upon petition by affected persons. (Wat. Code § 1357.) The SWRCB's regulations (23 Cal. Code Regs. § 768) list the following causes upon which an interested person may petition the SWRCB for reconsideration:

a. Irregularity in the proceedings, or any ruling, or abuse of discretion, by which the person was prevented from having a fair hearing;

b. The decision or order is not supported by substantial evidence;

c. There is relevant evidence which, in the exercise of reasonable diligence, could not have been produced;

d. Error in law.

2.1 Area I's Grounds

Area I alleges that the first full paragraph on page 13 of Order WR 95-6 (in section 3.3.1) is subject to misinterpretation or misconstruction, which Area I argues

could result in an error in law. This allegation is discussed in Part 4 below.

2.2 San Joaquin's Grounds

San Joaquin alleges as grounds for reconsideration that the SWRCB violated the California Environmental Quality Act (CEQA), that the SWRCB failed to consider and apply certain statutes, that Order WR 95-6 is not supported by substantial evidence, that the SWRCB violated San Joaquin's due process rights through alleged bias in the proceedings, and that the SWRCB violated San Joaquin's rights through vagueness in WR 95-6. Thus, San Joaquin alleges three of the above causes: (1) that there is error in law, (2) that the order is not supported by substantial evidence, and (3) that there was irregularity in the proceedings. As a remedy, San Joaquin requests that the SWRCB set aside Order WR 95-6 and hold a hearing on disqualification of SWRCB members and staff. San Joaquin's allegations are discussed in Part 5 below.

2.3 Porgans' Grounds

Porgans alleges as grounds for reconsideration that Order WR 95.6 is not supported by facts. This is in effect an allegation that the order is not supported by substantial evidence. Based on this allegation, Porgans requests that the SWRCB rescind Order WR 95.6. Porgans' petition is discussed in Part 6 below.

3.0 BACKGROUND

The SWRCB adopted Order WR 95-6 after holding a three-day evidentiary hearing, receiving written closing statements, and circulating the draft order to the interested parties in advance of the meeting at which the SWRCB adopted Order WR 95-6. Order WR 95-6 approved some but not all of the changes that the DWR and the USBR requested in their petition.

The SWRCB tightly conditioned its approval of the selected changes to ensure that its action complied with CEQA, with Water Code sections 1700 et seq., and with all other applicable laws. The conditions include termination of the approved changes on or before December 31, 1998. The conditions also include restrictions on the joint use of the export pumping facilities of the DWR and the USBR in the southern Delta to ensure that there are no increases in overall exports as a result of the authorization and that the authorization can be used only in connection with efforts to protect fish from entrainment by the export pumps. Order WR 95.6 requires that, prior to using the export pumps for these limited purposes, the DWR and the USBR obtain the review of interested parties to avoid any adverse effects. With these conditions, Order WR 95-6 will not injure any legal user of the water involved and will not unreasonably affect fish, wildlife, or other instream beneficial uses.

4.0 ISSUE RAISED BY AREA I

Area I asserts that its members hold the rights to the water delivered to its members by the USBR. Area I further asserts that the USBR cannot reduce the allocation

of water to Area I. Area I requests that the following paragraph on page 13 of Order WR 95-6 be clarified to avoid misinterpretation:

> "Some contract holders who buy water from the USBR also claim injury, but their rights to use water are dependent on the USBR's right to divert and use the water. Where the USBR has obligations either under its permits or under other laws to limit the amount of water it diverts and the times when it diverts the water, the contract holders' entitlements in the same water are likewise limited. Additionally, the USBR's water right permits and licenses, while they authorize the USBR to divert water for beneficial uses, do not require the USBR to do so. The permits and licenses set the maximum amounts that the USBR can appropriate, but the USBR can appropriate less than its permits allow. Where the USBR decides to take less water than it is allowed and supplies less water to a contract holder than the contract holder claims as an entitlement, the contract holder's dispute is with the USBR."

Area I believes that this language could be misconstrued or misinterpreted regarding the extent of an appropriator's water rights. Although the staff of the SWRCB explained the meaning and basis of this statement by letter dated June 26, 1995, Area I requests that the SWRCB formally clarify the specified language.

Area I's concern centers on the first two sentences of the above paragraph. Area I urges the SWRCB to clarify these sentences by stating that an appropriator's right to water can be no greater than the SWRCB-issued water right permit authorizing such appropriation. This is a correct

statement. These sentences are based on the discussion and holding in *United States v. State Water Resources Control Board* (1986) 182 Cal.App.3d 82, 145, 227 Cal.Rptr. 161, 197-198. These sentences point out that under state law the rights of water users who buy water from the USBR are no greater than the water rights of the USBR. For example, where the USBR's water right permit establishes a maximum quantity of water that the USBR can appropriate, the purchasers of water from the USBR do not have a right under the permit to obtain more water than the USBR can appropriate under the permit. This point also is supported by *California v. United States* (1978) 438 U.S. 645, 675-677, 98 S.Ct. 2985, 3001-3002.

The subject paragraph also points out that while SWRCB-issued water right permits establish the upper limits on water appropriations, they do not oblige a permit holder to take the maximum amount of water to which it is entitled. The paragraph further recognizes that regulatory agencies other than the SWRCB (including the U.S. Fish and Wildlife Service and the National Marine Fisheries Service acting under the federal Endangered Species Act) have the authority to issue orders that may have the effect of reducing the amount of water a water right holder such as the USBR feasibly can appropriate.

5.0 ISSUES RAISED BY SAN JOAQUIN

San Joaquin filed both a petition for reconsideration and a petition for writ of mandate in the Sacramento County Superior Court. The contents of the petition for writ of mandate are similar to the petition for reconsideration, but the allegations are organized differently.

5.1 CEQA Compliance

San Joaquin argues that the SWRCB violated CEQA in three ways: by using the Environmental Report (ER) as an environmental document for Order WR 95-6; by using the ER as a programmatic document under CEQA; and by failing to address the impacts of Order WR 95-6 in the ER. The use of an ER as an environmental document and the ability to use an ER (i.e., a certified program analysis) as a programmatic document are discussed together in Sections 5.1.1 and 5.1.2 of this order. Under the specific circumstances of this action the ER was properly used and is adequate to satisfy the requirements of CEQA.

5.1.1 *The Statutory Basis for Using the ER as an Environmental Document*

The SWRCB used the ER as the environmental documentation for the adoption of Order WR 95.6. The ER was prepared under Public Resources Code section 21080.5 as a certified program analysis of the environmental effects of the 1995 Bay-Delta Plan. Order WR 95-6 temporarily implements some of the objectives adopted in the 1995 Bay-Delta Plan. As a result of Order WR 95-6 and the actions of other agencies, the 1995 Bay-Delta Plan will be implemented in the short term.

Order WR 95-6 at pages 31.35 explains why the use of the ER as the environmental documentation for Order WR 95-6 is appropriate. Primarily, the SWRCB relied upon the opinion of the Deputy Secretary and General Counsel (Resources Counsel) of the California Resources Agency issued April 4, 1995. The Resources Counsel pointed out that the rules that apply to the use of an EIR by a

responsible agency also apply to the use of a certified program analysis prepared under Public Resources Code section 21080.5. (See 14 Cal. Code Regs. § 15253.) This means that a responsible agency is required to use the environmental analysis prepared pursuant to a certified program in the same manner as reliance on an EIR or negative declaration.

As the Resources Counsel further explained, a single EIR can be used to support implementation of an entire program without having to prepare additional EIRs or negative declarations. (14 Cal. Code Regs. § 15168(c)(5).) The CEQA Guidelines, at section 15165, require that when individual projects are, or a phased project is, to be undertaken and where the total undertaking comprises a project with significant environmental effect, the lead agency shall prepare a single program EIR for the ultimate project. (14 Cal. Code Regs. § 15165.) Where an individual project is a necessary precedent for action on a larger project, or commits the agency to a larger project, with significant environmental effect, the EIR must address itself to the scope of the larger project. (*Id.*) A program EIR is used for actions that are logical parts in the chain of contemplated actions. A program EIR must address itself to the scope of the larger project as well as providing an adequate analysis of the initial activity. (See 14 Cal. Code Regs. § 15168.) In preparing the ER, the SWRCB intended to meet the substance of sections 15165 and 15168 in the ER notwithstanding that the ER is a substitute for an EIR.

The Resources Counsel pointed out that to dispense with additional EIRs or negative declarations for later projects, the program EIR must be comprehensive and specific. (14

Cal. Code Regs. § 15168(c)(5).) Subsequent activities that are within the scope of the project described in the program EIR require no further documentation. (*Id.*) If a subsequent project would have *significant impacts* that are not addressed in the program EIR, a subsequent or supplemental EIR is required. (See 14 Cal. Code Regs. § 15168(c).) The program EIR can be used to simplify the task of preparing any environmental documents that are required for later parts of the program. (14 Cal. Code Regs. § 15168(d).)

The Resources Counsel explained that, while not mandatory, a certified program's analysis may be prepared in the same manner as a program EIR. All provisions of CEQA apply to the use of a certified program analysis in the same manner as a regular EIR, except the provisions that are specifically exempted. (*EPIC v. Johnson* (1985) 170 Cal.App.3d 604, 216 Cal.Rptr. 502.) Based on *EPIC*, it is the opinion of the Resources Counsel that an environmental analysis which is prepared programmatically may serve as a basis for subsequent implementing actions without the need to prepare additional environmental review documents.

The SWRCB explained in Order WR 95-6 at page 33 a second reason why an EIR substitute should be adequate for a subsequent action on the same project when the lead agency takes the subsequent action. That is, the CEQA regulations require the use of an EIR substitute by a responsible agency for a subsequent approval when the EIR substitute meets the specified criteria. (14 Cal. Code Regs. § 15253.) This regulation does not, however, discuss the use of an EIR substitute by the same agency for a subsequent approval. Apparently this is an oversight,

since most lead agencies do not need to take more than one action to carry out a project. The SWRCB, however, must take a second action under separate authority to carry out the project described and analyzed in the ER. If the SWRCB's water right action were carried out by another agency, all of the criteria in section 15253(b) would be met, as is explained in Order WR 95-6.

5.1.2 *The ER Meets All of the Requirements for Use as a Programmatic Document*

The project analyzed in the ER is the adoption *and implementation* of the 1995 Bay-Delta Plan. The 1995 Bay-Delta Plan, however, is not self-implementing. If only the effects of adopting the plan were analyzed, there would be no need for an analysis because there would be no immediate changes in the physical environment. A subsequent action to implement the plan was required before the 1995 Bay-Delta Plan could have any physical effect.

The ER analyzes the effects of implementation because the CEQA Guidelines direct an agency not to piecemeal the analysis of the effects of a larger project where a series of individual actions are required to complete the project. The ER follows this directive to the extent possible, but does not reach the upstream effects of the future allocations of responsibility to water right holders[1] who

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[1] These parties have not yet been identified. Their responsibilities will be quantified in a water right proceeding which is currently commencing, but that proceeding will not be completed for approximately three years. Subsequent environmental documentation will cover the currently unknown effects of requiring additional water right holders to help meet the standards.

do not currently have responsibility to meet Bay-Delta water standards. The ER analyzes the effects of implementation on areas upstream of the Estuary using the assumption that all of the implementation responsibility will be carried out by the DWR and the USBR. The ER also analyzes the effects of adopting and implementing the 1995 Bay-Delta Plan on the environment in the Estuary and in the areas that receive water exported from the Estuary. The analyses for the Estuary and for the export areas may not require future supplementation.

All of the environmental effects of currently implementing the changes in the water quality standards through the efforts of the DWR and the USBR are adequately analyzed for CEQA purposes within the ER. Although Order WR 95-6 does not require the DWR and the USBR to implement all of the new standards, the DWR and the USBR are currently required, as a result of Order WR 95-6 plus the actions of other regulatory agencies, to meet the full set of new standards. San Joaquin nevertheless contends that the ER does not adequately analyze the effects of the SWRCB's temporary (until the end of December 1998) action to complete current implementation of the 1995 Bay-Delta Plan through the DWR and the USBR. In effect, San Joaquin is arguing that the SWRCB should prepare an environmental document that ignores the net effect of the several agencies' actions (which is identical to the effect of implementing the 1995 Bay-Delta Plan) and instead dissects the effects of each standard as if it had a separate effect. The standards interact, however, and the effect of their interaction differs from the sum of their individual effects. As a result, the dissection San Joaquin argues for would produce a theoretical result,

and it would not disclose the actual physical impacts that are most likely to occur.

San Joaquin asserts incorrectly that the ER does not discuss its role as a "Program EIR". In fact, the ER discusses both the programmatic nature of its analysis and the effects of implementation actions by the DWR and the USBR. The programmatic nature of the ER and the implementation of the plan are specifically discussed in the ER as follows. On page I-13, the ER points out that the SWRCB will use it "in conjunction with *subsequent implementation proceedings* to modify D-1485 to eliminate inconsistencies between that decision and the plan." On page II-1, the project definition describes the project as including review and amendment of *both* the objectives *and* the program of implementation. The project definition says that the program of implementation includes actions the SWRCB *will undertake*. In sections VII, VIII, XII, and XIII of the ER, the effects of implementation of the 1995 Bay-Delta Plan are analyzed. At page VIII-l, paragraph 2, the ER explains that because the objectives will not be implemented until a later decision, the ER analyzes the effects of implementation by using the USBR and the DWR as surrogates for the entire set of water right holders who ultimately may be responsible for meeting the objectives.

The SWRCB in Order WR 95-6 did not, as San Joaquin suggests, conclude that the ER is a programmatic EIR. The ER is a substitute for an EIR. Rather, the SWRCB concluded that the ER *meets the requirements* for a programmatic EIR. (See Order WR 95-6, page 32, 3d paragraph.)

As discussed above and in the CEQA Guidelines, a program EIR can be used to cover the first action in a series and to (1) cover the effects of some or all later actions or (2) simplify the task of preparing a subsequent EIR or negative declaration for a later action. (14 Cal. Code Regs. § 15168(c),(d).) The ER so far has been used for the initial action of adopting the 1995 Bay-Delta Plan and for the short-term implementing action which is Order WR 95-6. For future implementation of the 1995 Bay-Delta Plan, the ER will be used as a tiering document to simplify the task of preparing subsequent environmental documentation. Any necessary subsequent environmental documentation will be prepared for the future phases of implementation. This is in part because a different analysis will be needed when the SWRCB considers assigning responsibilities to parties in addition to the DWR and the USBR. Where implementation actions will not have any significant adverse effects which were not analyzed in the ER, as is the case for Order WR 95-6, subsequent or supplemental documentation is not required.

5.2 Water Code Compliance

Next, San Joaquin contends that the SWRCB failed to consider and apply a number of sections of California water law in approving the change petition filed by DWR and USBR. San Joaquin cites and copies numerous Water Code sections which it claims Order WR 95-6 violates, including sections from the Delta Protection Act (Wat. Code § 12200 et seq.), the San Joaquin River protection statute (Wat. Code § 12230 et seq.). the Watershed of Origin Act (Wat. Code § 11460 et seq. and § 11128), and the County of Origin Act (Wat. Code §§ 10505 and

10505.5). San Joaquin does not, however, explain in its petition for reconsideration why it believes these statutes have been overlooked or violated by the adoption of Order WR 95-6. Nor does San Joaquin explain why these statutes are material to a determination to approve a change petition in which no new rights were accorded to the USBR and the DWR. Notwithstanding San Joaquin's contention, Order WR 95-6 complies with all applicable Water Code provisions.

5.2.1 *Background*

San Joaquin apparently contends that Order WR 95-6 authorizes the DWR and the USBR to deprive San Joaquin's members of water supplies to which they are legally entitled. San Joaquin's members are situated in San Joaquin County, and the USBR's New Melones Reservoir is on the Stanislaus River upstream of San Joaquin's members. Apparently San Joaquin's members are concerned that in some way approval of Order WR 95-6 could reduce the amount of water from the Stanislaus River available for their uses. Some of San Joaquin's members buy or would like to buy water from the USBR's New Melones Project. Others of San Joaquin's members claim that they have water rights in the Delta that are senior to the rights of the USBR.

San Joaquin's water buyer members apparently want the SWRCB to order the USBR to deliver water to them. To justify such an order, San Joaquin is attempting to establish that its water buyer members have a water right to water the USBR has appropriated at New Melones Reservoir. The buyers have contracts with the USBR to buy

water when water is available, and they apparently assert that these contracts establish their water rights. In addition to seeking to establish a right under state law, SEWD and CSJWCD have filed an action against the USBR in federal court in an attempt to force the USBR to deliver water to them in preference to fish releases. The U.S. District Court for the Eastern District of California denied their request for a preliminary injunction on March 17, 1995. (*Stockton East Water District and Central San Joaquin Water Conservation District v. United States of America et al.* No. CV-F-94-6103 OWW.)

San Joaquin's water buyer members are not getting as much water from New Melones Reservoir under their contracts as they anticipated. At the time of the hearing, the USBR in 1995 planned to deliver up to 37,000 acre-feet (af) to CSJWCD, but no water to SEWD. SEWD and CSJWCD recently completed the Goodwin Tunnel to transport New Melones water to their service areas from Goodwin Dam on the Stanislaus River. The tunnel cost $65 million and their contracts with the USBR allow them to buy up to 155,000 acre-feet per annum (afa) of water. Their contracts to buy water from the USBR, however, are prioritized behind earlier contractors. SEWD's contract provides only an interim water supply that can be reduced as demands by other contractors, including CSJWCD, increase. (SEWD 1, page 5.)

San Joaquin's members who claim senior water rights for agricultural use in the Delta want the USBR to release water from New Melones Reservoir on a schedule that will ensure that they will receive high quality water throughout their summer irrigation season. They are concerned that if more water than necessary is released for

fishery protection early in the year, New Melones Reservoir will run out of water by the end of the summer.

5.2.2 *Allegations that the USBR's Permits are Violated*

San Joaquin contends that Order WR 95-6 allows USBR to release more water from New Melones Reservoir for fishery protection than is necessary, and that the USBR is exporting the water released for fish when the water reaches the Delta. San Joaquin further alleges that the export of water that originated in the Stanislaus River and was controlled by the New Melones Project is a violation of the New Melones water right permits. The New Melones water right permits prohibit the USBR from delivering water appropriated under these permits for consumptive uses outside the counties of Stanislaus, Calaveras, Tuolumne, and San Joaquin. For the reasons discussed below, however, the USBR would not necessarily violate its New Melones project permits even if it exported the water when it reached the Delta pumps.

The flow releases San Joaquin apparently is most concerned with do not fall within the scope of the SWRCB's current proceeding. The current proceeding addresses a petition filed by the USBR and the DWR asking for changes. San Joaquin has not followed the appropriate procedures for requesting that the SWRCB take an enforcement action against the USBR. San Joaquin could file a complaint with the SWRCB under Title 23, California Code of Regulations, section 820 et seq.

Nevertheless, San Joaquin's issue merits some discussion of whether and under what circumstances a permit violation could occur under the facts alleged by San Joaquin. As is discussed above in Part 4.0, a water right permit holder is not obliged by its permit to appropriate the maximum amount of water to which it is entitled. Nor does the permit prohibit the permittee from either abandoning the water or using the water for fewer than all of the beneficial uses for which it was appropriated.[2]

Among other beneficial uses, the USBR's New Melones permits authorize appropriation of water for fish and wildlife preservation and enhancement uses. During the time since the New Melones permits were approved under Water Right Decision 1422 in 1973, the USBR's water right permits have not limited the amount of water the USBR can release for fishery protection. Order WR 95-6 did not change this. Consequently, the USBR can release as much water as is necessary for fishery protection without violating its water right permits. The USBR currently is using its New Melones permits to satisfy its obligation under the federal Endangered Species Act to minimize its take of Delta smelt incident to operation of the Central Valley Project. New Melones is a component of the Central Valley Project. The Biological Opinion for Delta smelt establishes minimum flows at Vernalis that are coupled with export limitations at both the USBR and the DWR pumping plants to protect Delta smelt habitat in the lower San Joaquin River. The San Joaquin River

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[2] *A permit may, however, require that certain amounts be released or bypassed for specified uses that are to be preserved, including fishery uses or prior water rights.*

instream fish flow releases are like return flow from irrigation; after the water has been put to the beneficial use for which it was appropriated, it is abandoned. If water has been abandoned, it can be appropriated again. The export constraints in Order WR 95-6 and in the Biological Opinion limit the amount of this water that can be reappropriated.

Because of the limited places of use authorized in the New Melones permits and because the permits do not authorize a point of diversion or rediversion in the southern Delta, the USBR would need changes in its permits before it could use its New Melones water rights to export water. However, the USBR has other permits that allow appropriation from the channels of the Delta and the USBR can appropriate any unappropriated water, including abandoned water, in the Delta under these permits. Thus, if the USBR releases water from New Melones Reservoir for the beneficial use of fish and wildlife preservation and enhancement, and this use is satisfied, the water remaining in the river becomes abandoned water that the USBR could appropriate along with unappropriated water from other sources.

It is unlikely that the USBR intentionally would release an unnecessarily large amount of water from New Melones in an attempt to export more water. If the USBR were to do this and then reappropriate and export the water, it could be argued that such a release constituted an unreasonable use of water, which would be a violation of its permits. Additionally, this water could be appropriated between the point where it was abandoned (at Vernalis) and the export pumps by other water right holders with seniority over the USBR's Delta permits. Since even

new water appropriators (including San Joaquin's members) can obtain seniority over the USBR with respect to water that otherwise would be exported for use outside the watershed of origin, it is unlikely that the USBR could export substantial amounts of abandoned water that originated in the San Joaquin River watershed. Further, if any abandoned water reached the southern Delta pumps, the DWR as well as the USBR would have the right to appropriate it. Thus, the USBR may not be able to recover enough excess water abandoned from New Melones Reservoir to make excess releases worthwhile. Finally, if the USBR were to make releases in excess of the amounts needed to protect fish, San Joaquin could request an enforcement action.

5.2.3 *Alleged Violation of San Joaquin River Protections*

The sections that San Joaquin cites and quotes from the San Joaquin River protections are discussed in Order WR 95-6 at pages 13 and 14. As the order explains, the San Joaquin River protection statute (Wat. Code § 12230 et seq.) does not apply to the permits amended by Order WR 95-6 for New Melones Reservoir.

5.2.4 *Alleged Violation of Watershed of Origin and County of Origin Acts*

The Watershed of Origin (Wat. Code §§ 11460 et seq. and 11128) and County of Origin acts (Wat. Code §§ 10505 and 10505.5) (Area of Origin laws) also do not support

San Joaquin's arguments. The Area of Origin laws[3] allow prospective in-area water users to obtain permits that have seniority over export water rights if (1) there is no water available for appropriation within the area and (2) water from the area is being exported to another area under a permit or license that is subject to one of the above statutes.

An exporter who knows that a prospective water buyer could obtain a senior water right could choose to serve the water in question within the area of origin instead of in the export area. If the exporter did not agree to serve the water within the area of origin, however, the in-area user's only recourse would be to pursue an application to appropriate the exported water. (25 Ops.Cal.Atty.Gen. 8, 20-21 (1955).) Since the USBR does not have permission to export water appropriated under its New Melones permits, a new in-area water user such as San Joaquin's members could not get seniority over the USBR's New Melones water right permits under these statutes. In the case of County of Origin applications, a new appropriator could only appropriate the amount of water that is produced within the county; water produced upstream in other counties would not be available to San Joaquin under this statute. (See *id.* at 17.)

San Joaquin alleges that the USBR nevertheless is exporting water previously stored in New Melones Reservoir to areas outside the area of origin. San Joaquin alleges that releasing water for fish in the Delta is a use outside the

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[3] *See, generally, 25 Ops.Cal.Atty.Gen. 8 (1955); 25 Ops. Cal.Atty.Gen. 32 (1955); 28 Ops.Cal.Atty.Gen. 307 (1956); 29 Ops.Cal.Atty.Gen. 136 (1957).*

county or watershed of origin. The fish releases San Joaquin complains of, however, are not required by Order WR 95-6. Even if Order WR 95-6 somehow caused increased releases from New Melones Reservoir, this allegation does not help San Joaquin. Because the water from the Stanislaus River (New Melones) flows in its natural course through the Estuary to the sea, the entire Estuary is within the watershed. The Watershed of Origin Act does not provide a basis for San Joaquin to obtain any preference or priority over other uses, including instream beneficial uses, that are in the watershed. The fish releases also are beneficially used within the place of use for New Melones water, since their purpose is to provide flows in the lower San Joaquin River, within San Joaquin County.

5.2.5 *Alleged Violation of Delta Protection Statutes*

Regarding San Joaquin's allegation that the Delta protection statutes are violated, there is again no explanation of how Order WR 95-6 will cause a violation of these sections. The Delta protection statutes (Wat. Code § 12200 et seq.) are intended to require the DWR and the USBR to provide salinity control and an adequate water supply for users of water in the Delta, as a condition of exporting water from the Delta. The purpose of Order WR 95-6 is to protect Delta water quality, not to increase exports. The changes approved in Order WR 95-6 and by other agencies improve water quality protection. If any violation of these sections by the DWR or the USBR exists, it is the result of the actions of entities other than the SWRCB, and not the result of adoption of Order WR 95-6. If San

Joaquin believes that a water right holder is violating its water rights, San Joaquin could, as explained above, file a complaint with the SWRCB. San Joaquin has not done so.

5.2.6 *Allegation Regarding Water Code Section 12931*

Finally, San Joaquin without explanation notes that Water Code section 12931 deems the Delta to be within the watershed of the Sacramento River. By its own terms, this statement is true only for the purposes of the chapter in which this section appears. That chapter addresses funding for construction of the State Water Project. It specifically does not affect water rights. (See Wat. Code § 12931.) Therefore, this section adds nothing to San Joaquin's contentions.

5.3 *Allegations of Injury to Legal Users of Water*

San Joaquin contends that Order WR 95-6 is not supported by substantial evidence. San Joaquin bases this contention on its assertion that there are no findings under Water Code section 1702[4] that say that the changes approved in Order WR 95-6 will not operate to the injury of petitioners as legal users of the water. Order WR 95-6 complies with section 1702. The SWRCB gave substantial attention to the potential effects of the changes on San Joaquin's members. To ensure there would be no injury to San Joaquin's members or others who claim to be legal

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[4] *Water Code section 1702 requires the petitioner asking for a change in an existing water right to establish to the satisfaction of the SWRCB that the change will not operate to the injury of any legal user of the water involved.*

users of the water involved, the SWRCB modified the proposed changes. In other words, Order WR 95-6 as adopted will not operate to the injury of any legal user of the water involved; nor will it operate to the injury of San Joaquin's members.[5] This is not a finding, however, that actions taken independently by other agencies including the USBR will not affect the water supply of water users who obtain water from the USBR.

5.3.1 *Change in Points of Diversion*

San Joaquin makes numerous allegations that it contends show [sic] violation of section 1702. First, San Joaquin rewords a finding on page 46 of Order WR 95-6 to imply that the SWRCB did not examine the effect of a change in the USBR's point of diversion in the southern Delta on other legal users of water. As reworded by San Joaquin, it would say the SWRCB "does not presume that the USBR will [implement the flows in a manner that will cause harm to legal users]." In fact the finding simply rejected an argument that if *any* change in point of diversion was allowed, the USBR would use it for the purpose of violating existing restrictions in its permits. The SWRCB refused to assume that the USBR would intentionally violate its permits if the SWRCB approved a change order.

Next, San Joaquin makes the bizarre contention that by placing limitations on its approval of the joint points of

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[5] *The SWRCB has not determined whether or not San Joaquin's members are legal users of the water involved within the meaning of Water Code section 1702.*

diversion to prevent injury to legal users of water, the SWRCB somehow violated section 1702. The very purpose of these limitations was to ensure compliance with section 1702 including avoiding any potential adverse effects on the environment and to protect San Joaquin's members from any possible loss of water attributable to Order WR 95-6.

The heart of San Joaquin's argument is a claim that the DWR and the USBR did not provide evidence to support a finding that the *requested* changes would not harm any legal user of water. This is simply incorrect. The DWR and the USBR did provide evidence for this purpose, but since the requested changes could have added as much as 30,000 af of water per year to the more than 6 million af annual diversions in the southern Delta, the SWRCB restricted its approval of the changes. San Joaquin, however, failed to rebut the evidence regarding lack of harm or explain why the evidence was unpersuasive. San Joaquin instead chooses to accuse the SWRCB of improperly shifting the burden of proof to the parties who claim to be legal users of water. The SWRCB did not, however, shift the burden of proof. It made its findings in accordance with the weight of the evidence. These findings, of course, are based on the changes approved by the SWRCB. There is no requirement that the SWRCB find that the changes *as proposed* by the DWR and the USBR would not have caused injury to any legal user of water. The changes *as approved* will not cause injury to any legal user of water.

5.3.2 *Change in Export Rate Limits*

Next, San Joaquin attacks the change in export rate limitations in May, June and July. The export rate limitations under D-1485 are 3,000 cfs in May and June and 4,600 cfs in July at each of the two pumping plants. Under Order WR 95-6 combined export rates are limited to 35 percent of Delta inflow during February through June and 65 percent of Delta inflow during July through January.[6] This change replaces a springtime export limit with all-year limits. Apparently San Joaquin fears that this represents an increase in exports in the spring, and that an increase in exports will mean a lack of water for its members' uses later in the summer. During wetter springtime periods more water will be exported and during drier springtime periods less water will be exported than previously. A higher export during wetter periods will not harm other water users since more water generally is available during these circumstances. On an average annual basis, this change reduces the net quantity of water that can be exported. It also shifts substantial quantities of export diversions from springtime, when fish are more susceptible to entrainment, to other times of year.

San Joaquin expresses particular concern about an export limit in Order WR 95-6 which applies from about April 15

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[6] *This change is intended to respond to the relationship between flows, exports, and fish entrainment in the export pumps. When flows in the Delta are higher, exports have less of an effect on aquatic resources.*

through May 15 for 31 days.[7] San Joaquin misunderstands this limit. Assuming that San Joaquin wants to limit or reduce exports, this limit will benefit San Joaquin. This new limit, set forth in Attachment B and in footnotes 10 and 11 of Attachment B, limits the combined export rate to 1,500 cfs or 100 percent of the average San Joaquin River flow at Vernalis, whichever is greater. This export limit is further limited so that combined exports in any event will not exceed the overall limit during February through June of 35 percent of Delta inflow. San Joaquin believes that this limit allows an *increase* in exports from the southern Delta. To the contrary, this *reduces* exports when it is in effect.

First, this is a new limit. Previously, the export rate could *exceed* the rate of flow in the San Joaquin River at Vernal is during this period. Figure 1 shows that during the reference period of 1984 through 1992, the exports in the southern Delta exceeded 100 percent of the Vernalis flow during the April 15 to May 15 period in all except one year, which was a wet year. Figure 1 shows that exports regularly have exceeded 250 percent of San Joaquin River inflow and in two years exceeded 400 percent. Further, Figure 2 shows that under modeled conditions using the 1984 through 1992 hydrology and existing water supply demands during April and May when the 100 percent limitation is in place, exports under D-1485 would be higher except in May of 1986 than they would be under the new standards (preferred alternative) with the increased Vernalis flows.

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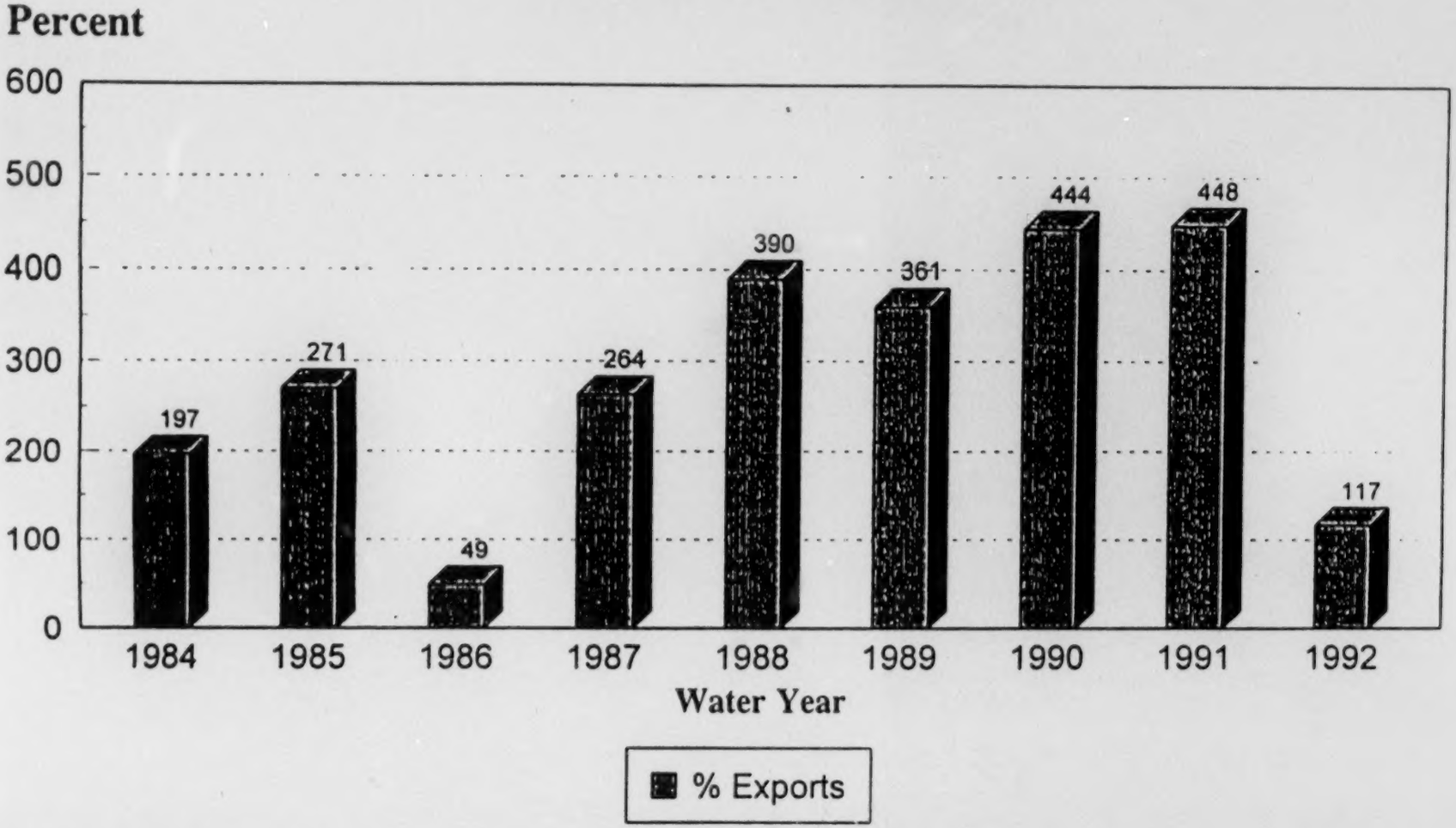
[7] *This is not a May-June limitation as San Joaquin states. It applies roughly from April 15 through May 15.*

Second, some of the water that will be exported in the southern Delta during this period will come from other sources. For example, modeling studies indicated that when Sacramento River flow is 15,000 cfs; San Joaquin River flow is 5,000 cfs; and export pumping is 9,000 cfs (180 percent of San Joaquin River flow), approximately 75 percent of the water exported originates in the San Joaquin River. (SWRCB-4, Item 142: Miller, Dr. William J., "Preliminary Analysis of Transport in the Sacramento-San Joaquin Delta.") Thus, the full flow of the San Joaquin River would not be exported during this period in any event. The 100 percent figure is merely a way of measuring the exports to ensure that exports are not so high that they will take too many young fish. San Joaquin apparently assumes that, like water in a stream system, the water at the export pumps is all from one source. Because the export pumps are in a tidal estuary, however, the waters from various sources are mixed at the pumps.

FIGURE 1

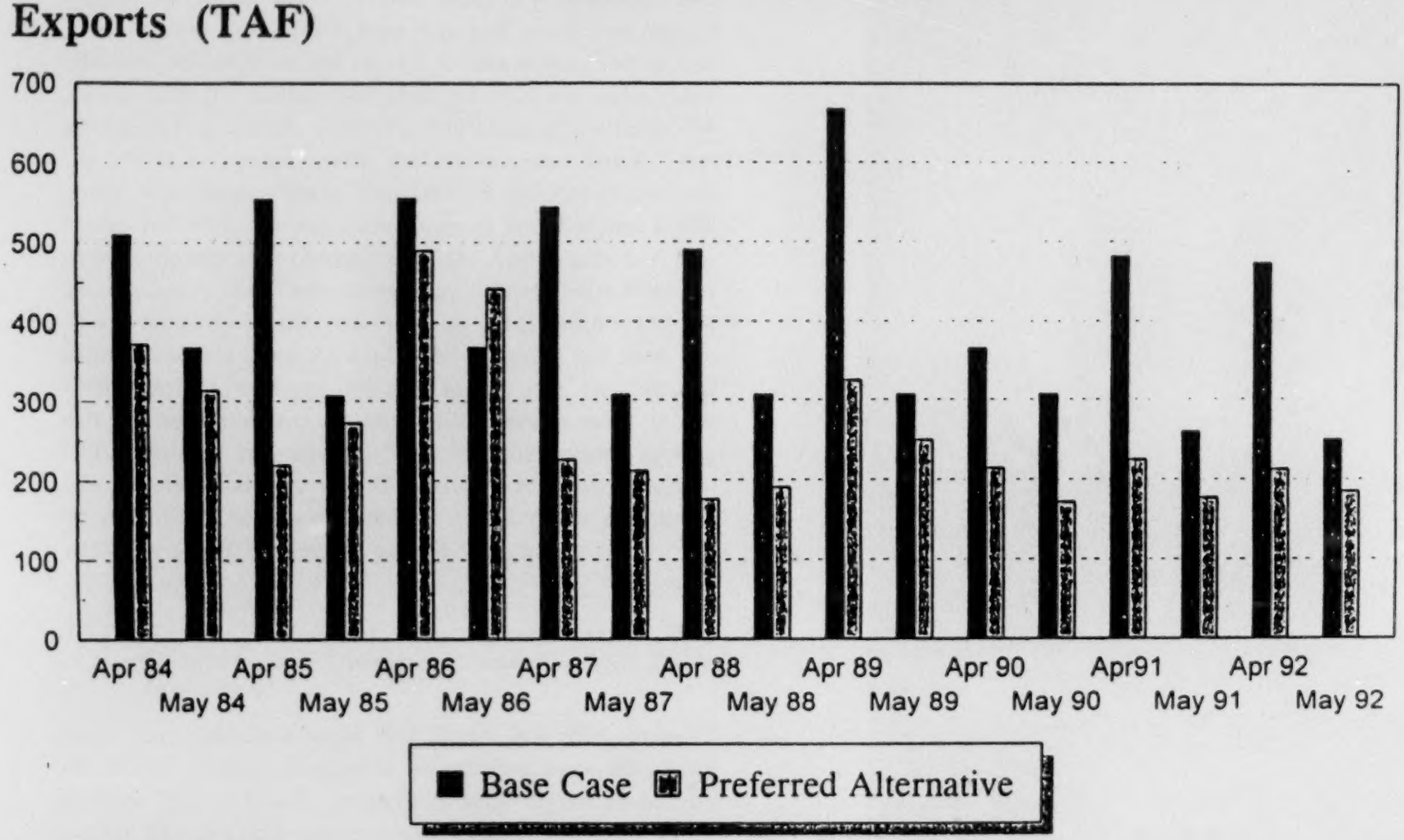
Average Historical Exports as a Percent of Vernalis Flow
April 15 through May 15
Water Years 1984-1992



Source: DAYFLOW
Percent exports is defined as the sum of SWP and CVP pumping divided by San Joaquin River flow at Vernalis, times 100

FIGURE 2

AVERAGE MODELED EXPORTS IN APRIL AND MAY
Water Years 1984-1992



Source: DWRSIM studies

Exports are defined as pumping at Banks and Tracy

5.3.3 *General Allegations of Harm*

Next, San Joaquin argues that consolidation of the points of diversion and other changes will cause an increase in rates of diversion resulting in adverse effects on the quality of water used by San Joaquin's members. San Joaquin does not explain how this will occur; nor does it cite any evidence in the record to this effect. The record shows that the authorized changes will not have these effects. It is possible, however, that changes instituted by the USBR to comply with the Endangered Species Act could have these effects. The SWRCB did not require, in Order WR 95-6, the instream flows at Vernalis that USBR independently is providing for fish. Apparently San Joaquin believes that these flows may deplete New Melones Reservoir early in the year, leaving inadequate water for salinity control later. As explained in Order WR 95-6, the USBR is not excused from meeting the agricultural salinity requirements at Vernalis. Consequently, if the USBR fails to manage its New Melones water supply adequately to ensure that the salinity requirements will be met, San Joaquin's members could file a complaint with the SWRCB alleging permit violations.

5.3.4 *Changes for Striped Bass, Suisun Marsh, Delta Cross Channel Operations, and Southern Delta Agriculture*

Next, San Joaquin alleges that Order WR 95-6 replaced the water quality standards for striped bass spawning and for Suisun Marsh protections with higher standards which San Joaquin apparently believes will put more demand on the waters of the San Joaquin River. Actually,

the new Suisun Marsh standards require less salinity protection than the previous standards. Also, the water that flows into Suisun Marsh at Montezuma Slough is primarily from the Sacramento River, and the flows in the San Joaquin River are not a significant source of salinity control for the Suisun Marsh. The new striped bass standard requires a lower (better) salinity than previously, but this standard almost always will be met by the agricultural salinity standard for that time period.

Next, San Joaquin contends that the change in the standard for Delta Cross Channel gate operation will cause deterioration in water quality at Vernalis. This is physically impossible. The Delta Cross Channel is in the northern Delta, connecting the Sacramento River and the Mokelumne River. Vernalis is on the San Joaquin River at the point where it enters the southern Delta. San Joaquin also repeats its contention at this point that the changes in export limits will result in additional exports. As explained above, this contention is incorrect.

Finally, San Joaquin contends that the change in the Vernalis agricultural salinity standard from that in condition 5 of Water Right Decision 1422 will cause the release of water from New Melones rather than taking this water from exports, reducing the quantity of water available for CSJWCD and SEWD to buy from the USBR. This contention is erroneous. The change merely improves the standard when improvement is needed for crops and reduces it when better quality is not needed for crops. The net water supply impact of this change is zero. Further, water for salinity control has been provided from New Melones Reservoir since New Melones Reservoir commenced

operating. Consequently, this change causes no added burden on New Melones Reservoir.

5.4 Allegations of Conflicts of Interest

San Joaquin contends that the SWRCB has denied it due process by having *ex parte* contacts with the parties to the Principles for Agreement which was executed December 15, 1994. The Principles for Agreement is a recommendation to the SWRCB for adoption of a particular set of water quality objectives and implementation measures for what became the 1995 Bay-Delta Plan. The Principles for Agreement was considered as evidence in a hearing on a draft of the 1995 Bay-Delta Plan, and the plan incorporates many of the features of the Principles for Agreement.

The Principles for Agreement also discusses changes in water rights to implement the Principles for Agreement or to implement the water quality control plan. San Joaquin's members are concerned that the SWRCB may believe that it is bound by the Principles for Agreement because the California Secretary for Environmental Protection signed it, and the SWRCB is under the California Environmental Protection Agency. This fear is unfounded. The SWRCB's members serve four-year terms and can be removed from office only by the Legislature and only for dereliction of duty, corruption, or incompetency. Further, the SWRCB is an independent agency and is not bound by law to follow the direction of the Secretary for Environmental Protection.

The SWRCB in its water right hearing received evidence regarding the Principles for Agreement along with other

evidence. In adopting Order WR 95-6, the SWRCB was not bound by the Principles for Agreement. For example, the SWRCB selectively approved only those changes which it found were appropriate and did not harm any interests. Further, it approved the changes for only a limited period.

While some of the wording in the Principles for Agreement may appear to direct the substance of the SWRCB's actions, the SWRCB believes this is merely an unfortunate choice of words. The parties to the Principles for Agreement had no authority to control the actions of the SWRCB. Also, most of the directive language in the Principles for Agreement is procedural, and is copied from the Framework Agreement which was executed in June and July 1994. The Framework Agreement sets a schedule for agency actions directed toward resolving Bay-Delta problems. The SWRCB signed the Framework Agreement, agreeing to proceed on a time schedule but not agreeing to the outcome. SWRCB's procedures in the Framework Agreement are the same procedures the SWRCB routinely uses.

Some staff of the SWRCB attended some of the negotiations or meetings that led to the Principles for Agreement. During the negotiations the Executive Director, the Assistant Division Chief for the Division of Water Rights, and the Chief of the Bay-Delta Unit attended a few meetings and provided institutional information. At the end of the negotiations, these staff members attended some meetings to listen to the parties go through their list of agreed points. During the negotiations, no staff member supported a particular interest, although staff did at times provide input on procedural matters and reported

on discussions between the staffs of the SWRCB and the U.S. Environmental Protection Agency on related issues that were not the subject of negotiations. Although San Joaquin implies that staff contacts with the negotiations were not disclosed prior to the water right hearing that led to Order WR 95-6, the Chairman of the SWRCB in fact disclosed the existence of the staff contacts at the beginning of the hearing on April 18, 1995. Additionally, it was announced during the public workshops held in the fall of 1994 that the staff would maintain contact with any parties who sought to negotiate agreements. San Joaquin's members participated in the workshops and could have raised their objections when this was announced or at any time after it was announced. Further, there is no legal prohibition against the staff contacts since the staff did not make the decision in Order WR 95-6 and did not communicate the substance of the information received to the members of the SWRCB. The Board members were not involved, even indirectly, in the negotiations.

At the hearing, the Chairman of the SWRCB also pointed out that no member of the SWRCB had attended any meeting in which the Principles for Agreement was negotiated. The members of the SWRCB are the sole decision-makers with respect to Order WR 95-6. San Joaquin nevertheless now assumes and argues that members of the SWRCB engaged in *ex parte* contacts.

The SWRCB through its attorneys has provided CDWA, a member of San Joaquin, access to all nonprivileged public documents in the possession of SWRCB staff that relate to negotiation of the Principles for Agreement. CDWA's attorney viewed these documents on May 31, 1995 and requested copies of some. These documents are in the

files of the SWRCB, and the SWRCB's staff entered the files in evidence at the start of the hearing. SWRCB's attorney provided the copies to CDWA's attorney by letter dated June 6, 1995. CDWA's attorney distributed copies of the documents to all parties by letter dated June 7, 1995 and distributed copies to participants at the Board meeting on June 8, 1995. CDWA's attorney additionally commented on the documents at the June 8, 1995 Board meeting.

The members of the SWRCB pointed out at the Board meeting when they adopted Order WR 95-6 that none of them had any *ex parte* contacts regarding the Principles for Agreement. While CDWA's attorney pointed out that a few documents related to the negotiations apparently were directed to the Chairman during the negotiations, the Chairman specifically pointed out at the Board meeting that he did not read the documents. Other Board members likewise pointed out that they were isolated from the negotiations on the Principles for Agreement.

Finally, San Joaquin says that at the Board meeting for adoption of Order WR 95-6, one of its members requested a hearing on the impartiality of the SWRCB members and staff, and was denied. The request at the Board meeting was untimely. With diligence, San Joaquin's member, CDWA, could have obtained all of the information on this subject before the Board's hearing which commenced on April 18, 1995. CDWA could then have presented this material as evidence and have received a ruling based on the evidence. Also, only certain staff had contacts with the negotiations, and since there is no legal impediment to the staff having the limited contacts that they had, a

hearing on their involvement would not show any bias in the decisionmaking.

5.5 Allegations of Vagueness

Lastly, San Joaquin suggests that it has been denied due process because of vagueness in Order WR 95-6. San Joaquin's contention is based on SEWD's apparent confusion during the hearing over the parameters of the change in points of diversion requested by DWR and USBR and the effects of the proposed change. The difficulties arose when expert witnesses explained the effects of the proposed change and variations of the change. Even though SEWD may have had difficulty understanding the evidence, the SWRCB, which is required to judge the evidence, has expertise in this area and understands both the request and the evidence that was provided. As a result of reviewing the evidence and the effects of the change, the SWRCB prepared a change which, while it is within the scope of the requested change, is considerably narrower. Based on the data and the analytical methods presented in the hearing, the SWRCB determined that the approved change could not adversely affect the environment or harm other legal users of water.

At the Board meeting, SEWD made further protestations of noncomprehension and now alleges confusion regarding the approved change stemming from comments at the Board meeting. Apparently SEWD's confusion arose because the findings in Order WR 95-6 point out that the petition, if approved as filed, would have allowed an increase in export yield from the southern Delta. Because the petition could have allowed an increase in export

yield, the SWRCB only partially approved the petition, narrowing its approval to the point that there can be no increased yield as a result of Order WR 95-6. In fact, the change in point of diversion is simply a change in the language of Term 3 of D-1485 to update it to the current standards. This is in effect a denial of this part of the change petition. SEWD ignores this. At the Board meeting, SEWD asked for further explanation and the SWRCB's staff explained again that the order would cause no change in water supply. The meaning of the DWR's and the USBR's request is no longer an issue.

6.0 ISSUE RAISED BY PORGANS

Porgans alleges that the order is not supported by substantial evidence, but he does not specify what part of the order lacks factual support. Nor does he specify the part or parts of Order WR 95-6 to which he objects. Because of its lack of specificity, Porgans' petition is denied. Nevertheless, the following discussion is included in this order to clarify the order with respect to Porgans' concerns.

Porgans' comments in Attachment B of his petition for reconsideration address effects on striped bass. The SWRCB assumes that Porgans is objecting to adverse effects he believes Order WR 95-6 will have on striped bass. Porgans' concern apparently is based on Figures VIII-37 and 38 in the ER. The third and fourth bars in Figure VIII-38 show a lower striped bass population under the preferred alternative (580,000) than would occur if the SWRCB took no action to change D-1485 (620,000). This is the result of an error in preparing Figure

VIII-38. The third bar, showing the striped bass population if there were no action to change D-1485, should show 560,000 striped bass using the calculation method that was employed. This is consistent with the text and graphs, which together indicate that the preferred alternative with a 1995 water supply demand level will produce striped bass populations which are essentially the same as D-1485 with a 1995 water supply demand level. The method used for calculating the future change in striped bass population is the best method available to the SWRCB, but like all models this method cannot predict the future population changes exactly. The calculation methods are explained in the text on pages VIII-34 and 35.

The ER is supported by the available evidence and supports the changes in the water rights of the DWR and the USBR that were approved in Order WR 95-6. Porgans has not established any deficiency in the evidentiary support for Order WR 95-6.

Apparently Porgans' principal difficulty is with the comparison of the preferred alternative to the 1984 through 1992 reference period. The ER compares modeled conditions under the preferred alternative to the actual hydrology and aquatic resources conditions from 1984 through 1992. Additionally, the ER compares modeled conditions under the preferred alternative to modeled conditions under D-1485 conditions, using either the 1984 through 1992 hydrology or the 1922 through 1992 hydrology and assuming that the 1995 water supply demand level exists. Compared with keeping D-1485 in effect, the preferred alternative has no adverse effect on aquatic resources in the Delta.

7.0 CONCLUSIONS

1. A certified program analysis prepared under Public Resources Code section 21080.5 can properly be used as environmental documentation for subsequent actions that implement the certified program action.

2. The environmental report for the 1995 Bay-Delta Plan is adequate to serve as environmental documentation for the action taken in Order WR 95-6.

3. The SWRCB by adopting Order WR 95-6 did not violate any provisions of the California Water Code directed toward protection of the San Joaquin River, protection of areas where water originates, or protection of the Delta.

4. No legal user and no entity that claims to be a legal user of the water involved will be injured by the SWRCB's partial approval of the DWR's and the USBR's change petition.

5. On an average annual basis, Order WR 95-6 will not result in an increase in exports of water from the southern Delta compared with exports under D-1485.

6. Suisun Marsh protections do not affect San Joaquin's members.

7. Delta Cross Channel gate operations do not affect water quality at Vernalis.

8. The change in the agricultural salinity standard for the New Melones project will not change the amount of water dedicated to this use from New Melones.

9. San Joaquin's members were not denied due process in the proceedings leading to Order WR 95-6.

10. Striped bass populations will be essentially the same under Order WR 95-6 in comparison to the striped

bass populations that would exist if D-1485 were to remain in effect.

11. The rights of entities who purchase water from the USBR are no greater than the water rights of the USBR under its water right permits. Further, a water right permittee is not required to appropriate all of the water authorized for appropriation under its permit.

ORDER

IT IS HEREBY ORDERED THAT the petitions for reconsideration are denied.

CERTIFICATION

The undersigned, Administrative Assistant to the Board, does hereby certify that the foregoing is a full and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on September 6, 1995.

AYE:	John Caffrey Mary Jane Forster James M. Stubchaer John W. Brown
NO:	None
ABSENT:	None
ABSTAIN:	Marc Del Piero

/s/ Maureen Marché
Maureen Marché
Administrative Assistant
to the Board

APPENDIX 5

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

In the Matter of Petition for Changes in the Water Rights Authorizing Diversion and Use of Waters in the Watershed of the Sacramento-San Joaquin Delta, held by **CALIFORNIA DEPARTMENT OF WATER RESOURCES** and **UNITED STATES BUREAU OF RECLAMATION**	ORDER: WR 95-6

ORDER REGARDING PETITION FOR CHANGES IN WATER RIGHTS THAT AUTHORIZE DIVERSION AND USE OF WATERS AFFECTING THE SAN FRANCISCO BAY/SACRAMENTO-SAN JOAQUIN DELTA ESTUARY

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STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

In the Matter of Petition for Changes in the Water Rights Authorizing Diversion and Use of Waters in the Watershed of the Sacramento-San Joaquin Delta, held by **CALIFORNIA DEPARTMENT OF WATER RESOURCES** and **UNITED STATES BUREAU OF RECLAMATION**	ORDER: WR 95-6

ORDER REGARDING PETITION FOR CHANGES IN WATER RIGHTS THAT AUTHORIZE DIVERSION AND USE OF WATERS AFFECTING THE SAN FRANCISCO BAY/SACRAMENTO-SAN JOAQUIN DELTA ESTUARY

BY THE BOARD:

1.0 INTRODUCTION

On February 28, 1995, the California Department of Water Resources (DWR) and the United States Bureau of Reclamation (USBR) filed a joint petition requesting changes in the water right permits listed in Attachment A. On March 3, 1995, the State Water Resources Control Board (SWRCB) gave notice of the petition and of a public hearing to commence on April 18, 1995 to consider the issues raised by the petition. On March 30, 1995 the SWRCB issued a supplement to the notice which pointed out that the environmental documentation to be used in

reviewing the petition is the environmental report appended to the 1995 Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary. On April 18, 19, and 20, 1995 the SWRCB held the public hearing and received evidence from the interested parties on the key issues listed in the notice. The record was held open to receive specified documents and written closing statements of the parties. These documents and statements were to be submitted by mail and postmarked by April 28, 1995. The SWRCB has considered all of the evidence and arguments in the hearing record. The SWRCB finds as follows:

2.0 BACKGROUND

The Bay-Delta Estuary includes the Sacramento-San Joaquin Delta, Suisun Marsh and the embayments upstream of the Golden Gate. The Delta and Suisun Marsh are located where California's two major river systems, the Sacramento and San Joaquin rivers, converge to flow westward through San Francisco Bay. The watershed of the Bay-Delta Estuary is a source of water supplies for much of the state. The water is used for municipal, industrial, agricultural, and aquatic environment purposes. The watershed is a source of drinking water for two-thirds of the state's population. The State Water Project (SWP) operated by the DWR and the Central Valley Project (CVP) operated by the USBR release previously-stored water into the Delta where they redivert the stored water and also divert natural flow. The water diverted by the two projects in the Delta is exported to areas south and west of the Delta through a system of water conveyance facilities.

2.1 Existing Water Rights

DWR and the USBR have permits and licenses to appropriate water. The SWRCB issued the USBR permits for much of the CVP pursuant to Water Right Decision 990 (D-990), adopted in February, 1961. The USBR has rights to divert water from the Trinity River under Permit Order 124. The SWRCB issued the DWR permits for the SWP pursuant to Water Right Decision 1275 (D-1275), which was revised in Water Right Decision 1291 (D-1291). In August 1978, the SWRCB adopted the Water Quality Control Plan for the Sacramento-San Joaquin Delta and Suisun Marsh (1978 Plan). which established revised water quality objectives for flow and salinity in the Delta and Suisun Marsh. In Water Right Decision 1485 (D-1485), also adopted in August 1978, the SWRCB required the DWR and the USBR to operate the CVP and the SWP to meet all the 1978 Plan objectives except some of the salinity objectives in the southern Delta. In 1991, the SWRCB adopted a water quality control plan (1991 Plan) which superseded parts of the 1978 Plan, but the SWRCB has not revised the water rights of the DWR and the USBR to reflect the changes in water quality objectives.

2.2 Events Leading to the Petition

In March 1994, the SWRCB commenced a proceeding to revise the water quality objectives for the Bay-Delta Estuary. Between April 1994 and the end of October 1994, the SWRCB held six public workshops and the SWRCB's staff held three public workshops to receive input from interested parties. During the workshops the SWRCB urged the interested parties to negotiate with other parties and

develop alternatives for revising the previous water quality objectives for the Bay-Delta Estuary. The Department of Fish and Game, Bay Institute of San Francisco, Delta Wetlands and United States Environmental Protection Agency and a coalition of some of the major water users developed proposals for the SWRCB to consider. The SWRCB evaluated these alternatives in its environmental review for the development of a draft Bay-Delta plan. After negotiations, a number of parties reached an agreed-upon recommendation to the SWRCB for changes in the Bay-Delta water quality objectives. This agreement is called the Principles for Agreement on Bay-Delta Standards Between the State of California and the Federal Government (Principles for Agreement). The Principles for Agreement was signed on behalf of numerous urban, agricultural and environmental interest groups and governmental agencies on December 15, 1994. The SWRCB used several elements of this agreement (with some modifications) and the other recommendations from interested parties in preparing the draft plan. The DWR and the USBR agreed shortly after December 15, 1994 to meet immediately the standards in the Principles for Agreement and in the draft 1995 Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary (1995 Bay-Delta Plan). (SEWD 11, p. 3.)

The draft 1995 Bay-Delta Plan was released on December 15, 1994. On May 22, 1995, after holding a hearing and receiving comments, the SWRCB adopted the 1995 Bay-Delta Plan. The 1995 Bay-Delta Plan supersedes both the 1978 Plan and the 1991 Plan. The SWRCB will commence a water right proceeding during 1995 to determine the

responsibilities of water right holders within the watersheds of the Bay-Delta Estuary to meet the objectives in the 1995 Bay-Delta Plan. This proceeding is expected to be completed within three years, and will include numerous water right holders in addition to the DWR and the USBR. Meanwhile, the water rights of the DWR and the USBR remain subject to the water right terms and conditions in D-1485, which implements the 1978 Plan.

2.3 Changes Requested in the Petition

The DWR and the USBR in their joint petition requested changes in some of the permit terms and conditions imposed by D-1485 and D-1422 so that they conform those terms and conditions with the new fish and wildlife standards for the Bay-Delta Estuary that are set forth in the Principles for Agreement. These conditions also are required by the U.S. Fish and Wildlife Service (USFWS) and the National Marine Fisheries Service (NMFS) under the federal Endangered Species Act (ESA). To obtain no-jeopardy findings for the DWR and the USBR operations that affect Delta smelt and winter-run Chinook. salmon, the DWR and the USBR committed themselves to meet the new standards. In making this commitment, they substituted the new standards for the D-1485 standards as their operating criteria. The biological opinions, therefore, are conditioned upon the DWR and the USBR meeting the new standards. In this proceeding, the SWRCB is considering whether to conform the water right permits of the DWR and the USBR with the 1995 Bay-Delta Plan.

The key issues for the hearing were as follows:

a. Issue 1: Should the SWRCB adopt the changes in the fish and wildlife standards required by D-1485, Table II which are set forth in Attachment B of the hearing notice?

   The proposed changes would amend the standards in D-1485 applicable to the western Suisun Marsh, limits on export rates, closure of the Delta Cross Channel Gates and salinity levels required in the San Joaquin River during April and May for striped bass spawning.

b. Issue 2: Should the SWRCB adopt the following condition?

   Terms and conditions of this permit other than water quality standards or flow requirements shall be interpreted and implemented to avoid conflict with the Principles for Agreement on Bay-Delta Standards Between the State of California and the Federal Government executed on December 15, 1994, a copy of which is attached to this permit and incorporated herein.

c. Issue 3: Should the SWRCB amend the conditions in Water Right Permits 16597, 16598, 16599 and 16600 issued pursuant to Water Right Decision 1422 (D-1422). Condition 5, as follows:

   Releases of conserved water from New Melones Reservoir for water quality control purposes shall be scheduled so as to maintain a *maximum 30-day running average of mean daily electrical conductivity (mmhos/cm)* ~~mean monthly total dissolved solids concentration~~ in the San Joaquin River at Vernalis of *0.7 during April through August and 1.0 during September through March* ~~500 parts per million or less~~ *as specified in the Water Quality Control Plan for the San Francisco*

Bay/Sacramento-San Joaquin Delta Estuary and a dissolved oxygen concentration in the Stanislaus River as specified in the Water Quality Control Plan ~~(Interim)~~, San Joaquin River Basin 5C, ~~State Water Resources Control Board, June 1971~~.

In the event that *either* ~~the~~ Water Quality Control Plan ~~(Interim)~~ is amended or superseded, the foregoing water quality objectives shall be modified to conform to then current criteria.

d. Issue 4: Should the SWRCB adopt the following conditions in each of the permits listed in Attachment A?

(a) For the DWR permits:

In addition to all other points of diversion or rediversion authorized by this permit, permittee may divert water at the Clifton Court Forebay, located within the NW-1/4 of the SE-1/4 of Projected Section 20, T1S, R4E, MDB&M, and (with the approval of the USBR) at the Tracy Pumping Plant, located within the SW-1/4 of the SW-1/4 of Projected Section 31, T1S, R4E, MDB&M, provided that permittee shall not divert water at a rate higher than 10,350 cubic feet per second as a combined diversion rate from the Tracy Pumping Plant and the Harvey O. Banks Pumping Plant except when needed to make up for export constraints that reduce the amount permittee can export to less than the maximum percent of inflow authorized in Table II [see Attachment B of the notice]. Any increase in permittee's total export diversion rate above 10,350 cfs shall be subject to a finding by the Chief of the Division of Water Rights that the increased export rate will not have unreasonable effects on fish and wildlife.

(b) For the USBR permits:

In addition to all other points of diversion or rediversion authorized by this permit, permittee may divert water (with the approval of the DWR) at the Clifton Court Forebay located within the NW-1/4 of the SE-1/4 of Projected Section 20, T1S, R4E, MDB&M, and at Italian Slough, located within the NW-1/4 of the NE-1/4 of Projected Section 24, T1S, R3E, MDB&M, provided that permittee shall not divert water at a rate higher than 4,600 cubic feet per second as a combined diversion rate from the Tracy Pumping Plant and the Harvey O. Banks Pumping Plant, except when needed to make up for export constraints that reduce the amount permittee can export to less than the maximum percent of inflow authorized in Table II [See Attachment B of the notice]. Any increase in permittee's total export diversion rate above 4,600 cfs shall be subject to a finding by the Chief of the Division of Water Rights that the increased export rate will not have unreasonable effects on fish and wildlife.

e. Issue 5: Terms 7 and 8 of D-1485 are no longer needed and should be deleted. If the terms in Key Issue 4 are added, Term 3 of D-1485 will no longer be needed. Should Terms 3, 7 and 8 be deleted?

3.0 PARTIES

3.1 Positions of Parties Presenting Only Policy Statements

Six parties presented only policy statements. Perry Herrgesell, representing the Department of Fish and Game, supported retaining the standards for stations S-35 and

S-97 in the western Suisun Marsh and delaying their implementation until October, 1997. Mr. Herrgesell also recommended (1) a change in footnote 4 to Attachment B of the hearing notice, (2) some minor changes in the Suisun Marsh standards, (3) adoption of the striped bass spawning standard of 0.44 EC (mmhos/cm) with the clarification that this standard must be met at both Jersey Point and Prisoners Point, and (4) the inclusion of language that would provide operational flexibility to make up for export constraints that reduce exports to less than the maximum percent of inflow.

Gary Bobker, representing the Bay Institute of San Francisco, supported the proposed changes in D-1485 under Issue 1 as modified by the operations group, with the addition of the narrative objective in the 1995 Bay-Delta Plan for protection of the Suisun Bay brackish tidal marshes. He opposed the changes in Issues 2 and 4.

Robert Helwick, representing East Bay Municipal Utility District, expressed the concern that if the joint points of diversion are approved project operations in the fall to make up for export constraints could adversely affect salmon migration to the Mokelumne River.

David Guy, representing the California Farm Bureau Federation, while expressing the need to protect existing water rights, supported approval of the joint points of diversion in the Delta.

Jim Easton, representing Delta Wetlands, asked that the SWRCB limit the approval of the joint points of diversion so that neither the DWR not the USBR can increase their maximum rate of diversion or the total quantity that they are entitled to divert under their existing rights.

David Fullerton, representing the Natural Heritage Institute, opposed adoption of the term set forth under issue 2 and supported the approval of the joint points of diversion if the approval is properly constrained to avoid additional average annual exports.

3.2 Positions of Parties Presenting Evidence

The DWR and the USBR made a joint presentation. In opening, the DWR and USBR requested that in addition to the matters requested in the petition, that the SWRCB replace the striped bass survival standards in D-1485, for May 6 through July, with the outflow standards in the Principles for Agreement for May through July. The notice of hearing did not include this change. The DWR and USBR also asked that the Chipps Island standards be deleted as part of the change in the Suisun Marsh standards, but said they were not pressing this point. They did not favor deleting the D-1485 conditions listed in issue 5. For the short term, the DWR and the USBR asked for only partial approval of the requested joint point of diversion, limited to approval to the amounts of water that either the DWR or the USBR could export within the maximum diversion rates set forth in their permits. They asked that the SWRCB continue the matter of considering approval of using the joint points of diversion to divert water in excess of their current maximum diversion rates until they had worked with other parties to develop an acceptable approach. They noted that Contra Costa Water District had approached them regarding the inclusion of a condition on the use of the joint points of diversion relative to the Los Vaqueros project, but that they had not yet reached agreement.

The agencies that compose the Joint California Water Users group (JCWU) made a joint presentation. These agencies include Westlands Water District, the San Luis and Delta-Mendota Water Authority, Kern County Water Agency, the State Water Contractors, and the California Urban Water Agencies. The attorney for Kern County Water Agency conducted the direct examination. The JCWU generally supported the petition. They presented alternative language for issue 4, and they recommended that the SWRCB not act on changes to the Suisun Marsh standards in D-1485 at this time.

The California Sportfishing Protection Alliance (CSPA) generally opposed the petition. CSPA questioned the validity of the SWRCB's noticing the petition and setting it for hearing at one time, and also asserted that the SWRCB could not use the Environmental Report for the 1995 Bay-Delta Plan as environmental documentation for approval of the petition. CSPA also questioned the validity of projected water costs predicted by the DWR/USBR models. (CSPA Y, p. 2.) According to CSPA, the water supply impacts were over-estimated due to inflated base water demand estimates. CSPA argues these inflated demand estimates produced base exports that are greater than historical exports. (CSPA CC, p. II-2.) Also, CSPA questioned the use of the 1995 Bay-Delta Plan's environmental checklist and argued that the SWRCB should obtain an independent group to conduct an unbiased review of the modeling assumptions, such as export demand and water costs. (CSPA Y, p. 2.)

The water users in Area I of Westlands Water District (Area I) supported approval of the joint points of diversion but opposed approval of the changes proposed

under issues 1, 2, and 5 unless an expiration date is included and the SWRCB waives the statute of limitations on its action approving the petition.

The San Joaquin Tributaries Agencies (SJTA) supported approval of the joint points of diversion, but expressed concerns regarding the lack of an Old River barrier to protect out-migrating San Joaquin River Chinook salmon smolts. The San Joaquin Tributaries Agencies also alleged that implementing the plan will require them to contribute water for export pumping.

Stockton East Water District (SEWD), the City of Stockton (Stockton), Central Delta Water Agency, Reclamation District No. 2072, and R.C. Farms, Inc. (CDWA), South Delta Water Agency (SDWA), Central San Joaquin Water Conservation District (CSJWCD), and San Joaquin County coordinated their presentations.

Generally they opposed approval of the petition. They particularly objected to the proposed change in the Vernalis salinity standards, the change in export limits in May through July, the proposed term set forth in issue 2, and the joint point of diversion. Their contentions included arguments that approval of the petition would violate (1) the California Environmental Quality Act (CEQA), (2) the permits held by the USBR for the New Melones project, (3) prior orders issued by the SWRCB, (4) the federal authorization for the New Melones Project, (5) the area of origin laws at Water Code sections 11460 and 10505 et seq., (6) the Delta Protection Act at Water code section 12200 et seq., (7) the San Joaquin River Protection Act at Water Code section 12232, and (8) Water Code section 1702 which protects legal users of the water

from injury if a change petition is approved. Stockton points out that the amount and timing of exports and the existence of low flows or reverse flows in the San Joaquin River affects Stockton's ability to meet the dissolved oxygen objective near Stockton's discharge location, as required by its National Pollutant Discharge Elimination System (NPDES) permit. Also, Stockton opposes the use of water exclusively from New Melones to meet the southern Delta standards during the period before the SWRCB adopts a comprehensive water right decision. CDWA questions the qualifications of the SWRCB members and staff to participate in this matter due to alleged conflicts of interest. CDWA alleges the existence of significant adverse effects under CEQA of the proposed action that have not been considered, including impacts on water levels and water quality in the central and southern Delta and in the San Joaquin River, impacts on ground water levels and quality, and impacts on the economy of the areas of origin.

Contra Costa Water District (CCWD) generally supported the petition but asked for the inclusion of a term in connection with the proposed change in export limits in May and June that would avoid an adverse effect on CCWD's ability to divert water to Los Vaqueros Reservoir. CCWD noted that increases in export pumping by the DWR and the USBR during this period could make water unavailable to CCWD under a limit in CCWD's permits.

3.3 Legal Contentions of the Parties

As listed above, parties opposing approval of the petition made numerous legal arguments. These arguments fall generally into the areas of CEQA compliance, the requirement set forth at Water Code section 1702, statutes that protect areas of origin, the San Joaquin River and the Delta, a procedural issue regarding the processing of the petition, and conflict of interest. The issue of CEQA compliance is discussed in section 5.1 below. The other issues are discussed in this section and in connection with each of the proposed changes.

3.3.1 *Compliance with Water Code Section 1702*

The provisions of Water Code sections 1700 through 1707 govern changes in rights to divert and use water appropriated under the Water Code. These sections require the permission of the SWRCB before a change may be made. Section 1702 provides that "[b]efore permission to make such a change is granted the petitioner shall establish, to the satisfaction of the board, and it shall find, that the change will not operate to the injury of any legal user of the water involved." This section places a burden on the DWR and the USBR to prove that the proposed changes will not operate to the injury of other legal users of the water.

Several parties have claimed that they will be injured by one or more of the proposed changes. The factual issue of injury is discussed in connection with each of the proposed changes for which the allegation has been made. A legal user of water who could be injured would include any party who has an existing legally protectible right to

use the water, where the proposed action would adversely affect the legal user's ability to use the water. This could include other water right holders who would appropriate the water if the DWR or the USBR did not take it or abandoned it.

Some contract holders who buy water from the USBR also claim injury, but their rights to use water are dependent on the USBR's right to divert and use the water. Where the USBR has obligations either under its permits or under other laws to limit the amount of water it diverts and the times when it diverts the water, the contract holders' entitlements in the same water are likewise limited. Additionally, the USBR's water right permits and licenses, while they authorize the USBR to divert water for beneficial uses, do not require the USBR to do so. The permits and licenses set the maximum amounts that the USBR can appropriate, but the USBR can appropriate less than its permits allow. Where the USBR decides to take less water than it is allowed and supplies less water to a contract holder than the contract holder claims as an entitlement, the contract holder's dispute is with the USBR.

3.3.2 *Statutes Providing Special Protection*

The parties in the San Joaquin County area have invoked the protection of several statutes that apply to exports of water by the DWR and the USBR and to actions affecting the Delta and the San Joaquin River. These include the county of origin statutes at Water Code sections 10505 and 10505.5, the watershed of origin statute at Water Code section 11460 et seq., the Delta protections at Water

Code section 12200 et seq., and the San Joaquin River protections at Water Code section 12300 et seq.

The county of origin statutes provide in substance that no water right application filed by the state under Water Code section 10500 for the development or completion of a plan for the state's water resources can be used to provide water for use outside the county of origin if the water is necessary for the development of the county. The watershed of origin statute, together with Water Code section 11128, prohibits the DWR and the USBR from depriving the watershed or area of origin or an area immediately adjacent to it, of the prior right to all of the water reasonably required to adequately supply the beneficial needs of the watershed or area, or its inhabitants and property owners. These two statutes prohibit delivery of water for uses outside the protected areas to the extent that water needs within the protected areas meet the statutory tests. To obtain the benefit of these statutes, a water user in a protected area could file a water right application and receive a permit with seniority over the rights of the DWR or the USBR to export water from the area. Alternatively, the water user could seek to contract for water supplies from the DWR or the USBR.

The Delta protections are at Water Code section 12200 et seq. Section 12202 provides that the DWR and the USBR shall provide salinity control and an adequate water supply for the users of water in the Delta. Section 12203 provides that it is state policy that no person, corporation or public or private agency or the state or the United States should divert water from the channels of the Delta to which the users within the Delta are entitled. Section 12204 provides that no water shall be exported from the

Delta which is necessary to meet the requirements of sections 12202 and 12203.

The San Joaquin River protections are at Water Code section 12230 et seq. Section 12230 declares that a serious water quality problem exists in the San Joaquin River between the Merced River and Middle River. Section 12232 forbids state agencies, including the SWRCB and the DWR, from taking any action to cause further significant degradation of water quality in the protected reach. Section 12233, however, provides that this law shall not affect any vested right to the use of water for which an application to appropriate water was filed with the SWRCB prior to June 17, 1961. The applications of the USBR to appropriate water at New Melones Reservoir on the Stanislaus River were filed on March 11, 1960 and on June 16, 1952. Since these applications preceded the enactment of Water Code sections 12230 et seq., the permits for New Melones Reservoir are not subject to these sections. Nevertheless, the SWRCB is mindful of the importance of improving salinity levels in the protected reach, and will consider including within the scope of its forthcoming comprehensive water right proceeding actions recommended by the parties to remedy the salinity problems in that area. The current proceeding on a petition for changes is not broad enough to accomplish the improvements in salinity which some of the parties are seeking.

3.3.3 *Procedures for Processing the Petition*

CSPA claims that the SWRCB deprived it of due process by giving notice of both the petition and the hearing in a

single notice. CSPA suggests that the SWRCB should instead have published notice of the petition in its monthly notice of petitions. However, the monthly notice is used for changes where controversy is not expected or where the need for a hearing is not a foregone conclusion. Notice of larger or more controversial applications and change petitions is given individually.

CSPA's objection to the procedure used is tantamount to a claim that CSPA has a right to delay a project. Where it is clear that a hearing cannot be avoided, and the project is ready for a decision, a hearing may be noticed immediately, as in this case. Notice of a petition and a hearing simultaneously is not unprecedented, and it avoids delays. If the SWRCB had noticed the petition and the hearing sequentially, the result would have been considerable delay in the proceeding.

In this case CSPA actually received both an opportunity to protest the petition and a hearing. This is more process than is required. First, Water Code section 1703 gives the SWRCB discretion whether or not to give any notice of a petition. Second, the SWRCB's regulations do not preclude the procedure used in this case. Third, CSPA was given a full opportunity to oppose the petition by this procedure. Indeed, CSPA was given an early opportunity to air its opposition to the petition before the SWRCB rather than spending time with paperwork to establish the validity of its protest. The combined notice and hearing satisfied the purpose of giving notice of an application or petition, which is to give any party who may have an interest an opportunity to make a case against the proposed action.

There was reason to move more quickly in this case than would be possible if extra time were provided for filing protests and answers. Under the current biological opinion for Delta smelt issued March 6, 1995, the DWR and the USBR are bound by requirements under the ESA that differ from their permit conditions in D-1485. Additionally, the DWR and the USBR agreed, subsequent to the signing of the Principles for Agreement, that they would meet flow requirements that would reduce their diversions of water. An early response to the change petition by the SWRCB will allow a change in operations this year.

3.3.4 *Conflict of Interest Allegations*

One party, CDWA questioned whether the SWRCB and its staff had maintained their impartiality with respect to the petition. CDWA expressed concern that the SWRCB may be bound to act consistently with the Principles for Agreement. In particular, CDWA expressed concern that the SWRCB may have negotiated and agreed to the Principles for Agreement, to the detriment of parties who did not participate in the negotiations. The SWRCB has responded to CDWA's inquiry. As explained in the response, the SWRCB is not bound by the Principles for Agreement, and the members of the SWRCB have taken great care to ensure their impartiality. None of the Board members attended any meetings in which the Principles for Agreement was negotiated. While some staff members attended some of the meetings, they were present only for the purpose of observing and providing information. They did not participate in the negotiations and they did not advocate any position that was the subject of the

Principles for Agreement. Nor did they serve as a communications link between the negotiators and the Board members. Under these circumstances there is no reason for any Board member or staff member to be disqualified from participating in this proceeding.

4.0 CONSIDERATION OF HEARING ISSUES

The petitioners have requested that the SWRCB take two actions. The first is to make changes in their water right permits that will make the terms and conditions of their permits consistent with the package of changes that are being required in their operations under new regulatory requirements. These changes are set forth in the 1995 Bay-Delta Plan. They also are in the Principles for Agreement, to which the DWR and the USBR agreed to operate, and in biological opinions for operation of the two projects. Without changes in their water right permits for operations in the Bay-Delta Estuary, the DWR and the USBR will have a greater reduction in water supply yield than they would have under either their D-1485 permits or under the new package of Bay-Delta protections. The new protections require export restrictions during parts of the year when they previously were unrestricted, while allowing more exports or fewer constraints than D-1485 during periods of some year types. The DWR and the USBR seek to conform their water right permits with the revised operational regime. In effect the DWR and the USBR are asking that the SWRCB give them authorization to operate to the entire new set of protections at this time and to relieve them from meeting those water quality objectives that have been replaced in the 1995 Bay-Delta Plan. When the DWR and the USBR agreed immediately

to meet the new Bay-Delta protections as set forth in the Principles for Agreement and in their biological opinions (SEWD 11, p.2-3), they did so with the expectation that they would not be required to meet the conflicting, seventeen year-old requirements in D-1485.

The second requested action is to allow the petitioners to have interchangeable points of diversion in the southern Delta. The conditions under which this latter request would be exercised was the subject of considerable discussion during the April 18, 1995 hearing. The petitioners originally sought an unrestricted use of each other's export facilities, but at the hearing they asked that the SWRCB consider the requested joint point of diversion in two phases: First, they request an immediate approval of the limited use of the joint point of diversion at the maximum rates of diversion that is currently authorized without the joint point of diversion. Second, they request that the SWRCB continue its consideration of an expanded use of the joint point of diversion until a later time.

4.1 Standard for Striped Bass Spawning

The petitioners requested that the D-1485 striped bass spawning standard in their permits be updated to reflect the standard in the Principles for Agreement. The 1995 Bay-Delta Plan contains a similar but different objective. During the hearing on this petition, several parties recommended a permit condition which they also had recommended for inclusion as an objective in the 1995 Bay-

Delta Plan. (RT Vol.II, p. 17.) The parties generally concurred in this recommendation, and the objective has been included in the 1995 Bay-Delta Plan.

The striped bass spawning objective in the 1995 Bay-Delta Plan differs from the D-1485 standard in three respects. First, the numerical objectives have changed. Second, the compliance locations have changed, and third, the method for relaxing this standard in water short years is changed. Instead of setting a standard and then relaxing it during critically dry years, the current standard does not apply during critically dry years.

While several parties expressed general concerns with implementing the 1995 Bay-Delta Plan outside a more comprehensive water right hearing, no parties expressed specific concerns with the appropriateness of implementing the striped bass spawning objective at this time. In the absence of serious concerns about immediately implementing this objective, the SWRCB finds that it is reasonable to adopt a permit condition that requires compliance with this objective as set forth in the 1995 Bay-Delta Plan.

In addition to requesting the above change in the striped bass spawning standard, the DWR at the April 1995 hearing (RT Vol. I page 42) and in its closing statement requested that the SWRCB also consider replacing the D-1485 striped bass survival standards in May through July (these are outflow standards to be achieved at Chipps Island) with the Delta outflow objective which is contained in the 1995 Bay-Delta Plan. D-1485 requires higher flows than the new objectives only in wetter years like 1995. However, 1995 is so wet that meeting the D-1485 striped bass survival standards is not likely to

cause the two projects to forego water deliveries or affect water storage levels.

This request was not set forth in the petition and was not included in the notice of hearing. As a result, the interested parties were not provided a full opportunity to respond to this request. Therefore, it would be not be fair to the other parties for the SWRCB to act on this request at this time. The SWRCB will consider implementing this objective when it conducts the comprehensive water right proceeding which will commence this year. The SWRCB does not expect that continuing to meet the striped bass survival standards will pose a significant operational burden to the USBR and DWR. However, if hydrologic conditions exist that would cost yield, the USBR and DWR could petition the SWRCB to consider this matter at that time.

4.2 Suisun Marsh Standards

The DWR and USBR petitioned the SWRCB to revise the Suisun Marsh standards to be consistent with the Principles for Agreement. The Principles for Agreement recommend that the SWRCB adopt the provisions of the Suisun Marsh Preservation Agreement (SMPA). The DWR, DFG, SRCD and USBR signed the SMPA in 1987. It differs from the current D-1485 standards[1] in two significant respects.

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[1] *In an order issued on December 5, 1985, the SWRCB changed the compliance dates for some D-1485 standards for Suisun Marsh. The SMPA includes compliance dates and locations similar to the revised D-1485 standards. As revised, D-1485 requires compliance with stations in the eastern Suisun Marsh by 1988 but authorizes phased implementation of the stations in the western Suisan Marsh, with objectives at all stations to be met by 1997.*

These are (1) it would relax the standards in short water supply years, and (2) it would provide for renegotiation if it becomes difficult to meet the standards.

The 1995 Bay-Delta Plan includes several changes in the Suisun Marsh objectives, which are discussed in the Environmental Report to the 1995 Bay-Delta Plan. (SWRCB Exhibit 3b, Appendix I, page VIII-48, et seq.) The 1995 Bay-Delta Plan objectives include relaxations in water short years for the western marsh consistent with the SMPA, but do not include relaxations for the eastern marsh. Even with relaxations in water short years, the western Suisun Marsh will, when the objectives are implemented, have better water quality under the revised objectives than it has had in the recent past. The revised objectives will provide reasonable protection to this area. No relaxations for the eastern Suisun Marsh are needed since the Delta outflow objective in the 1995 Bay-Delta Plan together with the normal operation of the Suisun Marsh Salinity Control Gates are sufficient to meet the unrelaxed standards even in water short years. Overall, the Suisun Marsh standards will when implemented provide a gradient of water-quality from the western Suisun Marsh to the eastern Suisun Marsh in water short years. Based on the Environmental Report in the 1995 Bay-Delta Plan this will be beneficial to the ecosystem.

During the hearing, some of the parties argued that the compliance date for DWR and the USBR to meet the objectives at stations S-35 and S-97 in the western Suisun Marsh should differ from the 1997 date in the 1995 Bay-

Delta Plan[2]. In accordance with a recommendation in the program of implementation for the 1995 Bay-Delta Plan, the parties to the SMPA and other parties intend to review the Suisun Marsh standards using new information on the relationships between channel salinity, soil salinity and Marsh plant production. As a result of the review, they may develop new recommendations for standards before the 1997 compliance date. The DWR asked the SWRCB to delete the implementation dates currently required in D-1485 and replace it with a "target" date of 1997. The JCWU recommended that the SWRCB not modify the D-1485 Suisun Marsh standards at this time, to help reserve a negotiating position with other parties. (RT Vol. II page 44.) The DFG recommended that the SWRCB incorporate the provisions of the 1995 Bay-Delta Plan in the water right permits (including the 1997 implementation dates for the western Suisun Marsh). (RT Vol. I page 16.)

In D-1485 and in the 1978 Plan the SWRCB found that the CVP and SWP have a mitigation responsibility to protect Suisun Marsh. (See figure VI-1 page VI-10 of the 1978 Plan.) In this proceeding the SWRCB has received no new information affecting the SWRCB's previous finding. In fact, the relaxation of the standards in water short years

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[2] *The western Suisun Marsh stations are S-21, S-42, S-97 and S-35. The 1995 Bay Delta Plan changed the 1993 and 1991 compliance dates for S-97 and S-35 respectively to 1997. These changes reflect recent information that shows that additional facilities or augmented overland water supplies are likely needed to meet the standards at S-35 and S-97. The compliance dates for stations S-35 and S-97 have been changed to 1997 to allow more time to plan and implement programs to meet the standards at these stations.*

as set forth in the SMPA and the 1995 Bay-Delta Plan for the western Marsh make it even more likely that these relaxed conditions could have been met absent the CVP and SWP. Therefore, it is appropriate to maintain the 1997 implementation date for the western Suisun Marsh stations (specifically S-42, S-35 and S-97) together with the relaxation provision contained in the SMPA and the 1995 Bay-Delta Plan in the water right permits of the CVP and SWP. However, other local water projects also can affect water quality in Suisun Marsh, and there is a need to review the appropriateness of Suisun Marsh salinity standards. This review is described in the implementation plan of the 1995 Bay/Delta Plan. Based on this review the SWRCB should evaluate by August 1997 the Suisun Marsh objectives, the implementation dates and the responsibility of other agencies to help meet these standards.

4.3 Standards for Operational Constraints

The USBR and DWR request that the SWRCB replace the May through July export limits in D-1485 with the new full-year export limits in the 1995 Bay-Delta Plan and replace the Delta Cross channel closures in D-1485 with the gate closures in the 1995 Bay-Delta Plan.

The Delta Cross Channel, Delta diversions and entrainment of fish in the Delta diversions are described in Chapter V of the Plan's Environmental Report. (SWRCB 3b, p. V-8 through V-10 and V-13 through V-21 of Appendix I.) The objectives for export limits are set as a combined inflow rate for Clifton Court forebay (minus actual Byron-Bethany Irrigation District diversion from Clifton

Court Forebay) and the Tracy pumping plant divided by the total inflow to the Delta. (SWRCB 3b, Appendix I, p. II-10.)

4.3.1 *Export Limits*

The 1995 Bay-Delta plan includes objectives for export limits to protect the habitat of anadromous and estuarine-dependent species. These limits reduce entrainment and mortality of young fish, eggs, and larval life stages by the major export pumps in the southern Delta. The export limits are intended to be used with intensive real-time monitoring designed to detect the presence of fish in areas adjacent to the pumps. (SWRCB 3b, Appendix I, p. VIII-29.)

The new export limits are a percentage of inflow. The 1995 Delta Plan limits export pumping to 35 percent of Delta inflow from February through June. Export pumping during this period can be increased to 45 percent in February if the best available estimate of the January Eight River Index is less than or equal to 1.0 MAF. The 1995 Bay-Delta Plan provides that when the best available estimate of the Eight River Index is between 1.0 MAF and 1.5 MAF, the export limit for February will be set by the operations group established under the Framework Agreement, and that it will be within the range of 35 percent to 45 percent. (SWRCB 3b, p. VIII-29 of Appendix I.)

The concept of limiting exports rates to a percentage of inflow is founded on two basic principles. First, exports may increase during periods when higher volumes of fresh water are flowing through the Delta without

increasing the risk of adverse biological effects. Correspondingly, exports should decrease during those years when freshwater inflow to the Delta is decreased and a larger percentage of fish and other aquatic organisms are geographically distributed further upstream where their susceptibility to export losses is increased. Second, the percentage of water diverted in recent years, particularly during the spring, has increased substantially above diversion levels (expressed as a ratio of exports to inflow) during earlier years when aquatic resources inhabiting the Bay-Delta system were at higher population levels. (SWRCB 3b, Appendix I, p. VIII-29.)

Relatively low export/inflow ratios are specified during February through June (35 percent) when fish, eggs, and larvae are especially vulnerable to entrainment at the pumps. The export limits during the remainder of the year allow exports to 65 percent because fish are less vulnerable at those times to diversion losses. This helps balance fish protection with water supply needs. (SWRCB 3b, Appendix I, p. VIII-29.)

In the interim before the SWRCB adopts a comprehensive water right decision to allocate responsibility for the Bay-Delta objectives, the SWRCB will authorize the DWR and the USBR to change from the D-1485 export limits to the export limits in the 1995 Bay-Delta Plan. This authorization will expire upon adoption of a comprehensive water right decision that allocates final responsibilities for meeting the 1995 Bay-Delta objectives or on December 31, 1998, whichever comes first.

In connection with the proposed changes, CCWD requested a special term to protect its right to divert

water to Los Vaqueros Reservoir. CCWD's right to divert to storage is premised upon avoidance of adverse effects on CVP and SWP operations "under permits and licenses for the Projects in effect on the date of this Order." Thus, a crucial portion of the foundation for CCWD's Los Vaqueros right to divert to storage is the water rights of the CVP and the SWP in effect as of the date of Water Right Decision 1629 (D-1629). (CCWD 1, p. 2-3.)

In recognition of Water Code section 1700 et seq., this order protects CCWD's water diversions from injury resulting from the petitioned changes in points of diversion which will allow joint use of the Banks Pumping Plant and the Tracy Pumping Plant by the DWR and the USBR. This order protects CCWD's right by precluding the DWR's and the USBR's use of each others' diversion points if the shift in diversion points would adversely affect any legal user of water. (See section 4.6 below.) If a shift in point of diversion would prolong balanced conditions in the Delta it could adversely affect CCWD rights issued pursuant to D-1629. Such operations should be avoided.

The change from the 3000 cfs per project limit on export pumping in May and June to the proposed standard could result in circumstances in which CCWD's ability to divert to storage under D-1629 would be reduced. However, this change is not a change in point of diversion, place of use, or purpose of use. Water Code section 1700 et seq. recognizes that changes in these three matters are changes in the water right and could result in injury to other legal users of water. The CVP and the SWP have water rights that are senior to CCWD's Los Vaqueros water rights. This change shifts the timing of constraints

on operations of the CVP and the SWP. Consequently, the new standard will, during some times of the year, allow DWR and USBR to capture flows under their existing rights that they could not capture under the old standard, but it will prevent them at other times from capturing flows that they could capture before. This is a shift in the regulatory constraints on exercise of the two projects' water rights, not a change in their water rights.

Representatives of Area I opposed the changes in operational constraints to the extent that these changes might cause reductions in irrigation water deliveries by the USBR. They stated that the 1995 Bay-Delta Plan does not sufficiently consider the economic impacts of the potential reductions in water supply. The USBR already has reduced its deliveries south of the Delta, however, in response to its obligation under the federal ESA. The SWRCB is under no obligation to analyze the impacts of the USBR's compliance with the federal ESA. (SWRCB 3b, Appendix II, p. 100.) The changes in the USBR's water right permits to authorize the new operational constraints will not result in further reductions in water supply beyond those set forth in the ESA biological opinions. Instead, these changes may allow an increase in water supply in some years above the current limits because the existing water right constraints on exports during May, June and July will change. During wet years this may allow more exports during these months. A complete analysis of water supply and economic impacts of shifting from the D-1485 standards to the new objectives in the 1995 Bay-Delta Plan is presented in Appendix I of the 1995 Bay-Delta Plan.

4.3.2 *Cross Channel Gate Closures*

The 1995 Bay-Delta Plan includes an objective for closure of the Delta Cross Channel gates. The objective requires the Delta Cross Channel gates to be closed 45 days during November through January, closed completely from February 1 through May 20, and closed for 14 days from May 21 through June 15. The purpose of this objective is to reduce the transport of emigrating salmon smolts, and eggs and larvae of other fish, into the central Delta where they are more vulnerable to entrainment by the major export pumps and local agricultural diversions. (SWRCB 3b, p. 13; Appendix I, p. VIII-27.)

The February through June period includes the peaks of both the migration season for winter and fall-run chinook salmon smolts, and the spawning season for species such as Delta smelt, longfin smelt, Sacramento splittail, and striped bass on the Sacramento River. The diversion of smolts, eggs, and larvae out of the mainstem of the Sacramento River through the Delta Cross Channel and into the central Delta exposes them to numerous hazards, including entrainment in agricultural diversions and the export pumps, increased temperature, reduced food supply, and longer migration routes. Closing the Delta Cross Channel gates reduces diversions of aquatic organisms into the central Delta, concentrates more flow in the mainstem Sacramento River, and helps transport eggs, larvae, and smolts into Suisun Bay. (SWRCB 3b, Appendix I, p. VIII-27.)

In the interim before the SWRCB adopts a comprehensive water right decision to allocate responsibility for the Bay-Delta objectives, the SWRCB will amend the permits of

the DWR and the USBR to change from the D-1485 Delta Cross Channel gate closure requirements to the gate closures for the Delta Cross Channel as set forth in the 1995 Bay-Delta Plan.

4.4 Requested Interpretation of D-1485

The DWR and the USBR request that the SWRCB adopt a new condition in the permits affected by D-1485 which provides, in effect, that all other conditions, including monitoring requirements, imposed by D-1485 are to be interpreted and implemented to avoid conflict with the provisions of the Principles for Agreement. The petition cites monitoring requirements imposed by D-1485 as an example of conditions that are to be interpreted to avoid conflict with the Principles for Agreement. The suggested condition is set forth in section 2.3 above.

A number of parties expressed concerns with this proposal. They contended that it is unclear who would decide, and under what circumstances, whether a particular condition should be reinterpreted. They were concerned that a permit term could be reinterpreted by the water right holder, or could receive an interpretation that differs substantially from the plain meaning of the term. Because this term is unclear and has no prior usage in water right permits and licenses, it can be read as providing an opening for substantially changing a permit or license term without notice. In consideration of the substantial concerns of the parties, the requested condition will not be adopted.

4.5 Vernalis Salinity Standard

The USBR has requested that the SWRCB take notice of Condition 5 of D-1422 and conform the water quality objectives specified in the CVP water right permits issued pursuant to D-1422 with the current water quality objectives for Vernalis of 1.0 and 0.7 mmhos/cm EC for the specified periods of the year. Recently some confusion has existed as to whether the USBR must meet the 500 mg/l standard in D-1422 or the 1.0 and 0.7 mmhos/cm EC objective in the water quality control plan. While the 1.0/0.7 mmhos/cm objective has been in the water quality control plan since 1978, it has not been implemented through a change in the USBR's water right permits for New Melones. Approval of the proposed change will clarify that the USBR must meet the latter objective at Vernalis. The text of the proposed amendment to Condition 5 is set forth in section 2.3 above.

The petition requested immediate implementation of the new salinity objective only at Vernalis. The USBR's current obligation in D-1422 is to meet the 500 mg/l TDS standard at Vernalis only. The SWRCB will consider in its comprehensive water right proceeding the allocation of responsibility for meeting this objective at the other stations in the southern Delta where the plan specifies that this salinity is required. At this time it cannot be determined whether the USBR or another party should be responsible for this objective at the other stations.

The 1.0/0.7 mmhos/cm EC objective requires approximately the same amount of water each year as the 500 mg/l TDS objective. (RT Vol. I, p. 199-200.) Therefore, it

will be approximately equivalent to the current requirement at Vernalis in terms of water supply cost.

The 1978 and 1991 Plans established agricultural objectives in the southern Delta based on the salt-sensitivity of beans and alfalfa, the two most widely grown salt-sensitive crops in the southern Delta. Meeting the objectives for these crops also protects other, less salt-sensitive, crops. (SWRCB 3b, p. VIII-61 of new ER; SWRCB 1, p. 5-12 of 1991 WQCP.) An objective of 0.7 mmhos/cm EC in the southern Delta protects beans during the summer irrigation season (April 1 through August 31) and an objective of 1.0 mmhos/cm EC protects alfalfa during the winter irrigation season (September 1 through March 31). The objectives in the 1995 Bay-Delta Plan are the same as the objectives set forth in the 1991 Plan except that the compliance date for the Old River objectives is extended by two years. (SWRCB 3b, p. VIII-61 of Appendix I.)

Some of the parties argued that summer crops are irrigated through October, and that this objective will, if implemented, provide worse salinity during September and October than currently is required. While the irrigation water during these months may be more saline, however, the important factor is the salinity of the soil. Because this objective provides lower salinity levels than the old objective starting in April, the soil salinity can be expected to be lower in September and October than it would be if it had been irrigated all summer with water having a salinity of 500 mg/l TDS. During September and October, summer crops including beans are less salt-sensitive than they are earlier in the summer.

This order requires the USBR to meet the new salinity objective at Vernalis. The SWRCB will consider requiring implementation of this objective at the other stations specified in the objectives when it adopts a comprehensive water right decision as a result of the forthcoming water right proceeding.

4.6 Changes in Points of Diversion and Rediversion

The petitioners requested that the SWRCB add points of diversion and rediversion to the D-1485 permits of the DWR and the USBR listed in Attachment A adding authorizations for the DWR to divert or redivert water at the Tracy Pumping Plant and at Clifton Court Forebay and for the USBR to divert or redivert water at the Clifton Court Forebay and at Italian Slough. (SWRCB 4.)

The proposed change could be used to decrease the impacts of export diversions on Delta fisheries. The two diversions are at different locations and can entrain fish species at different rates. A combined point of diversion would allow pumping to shift between diversion points based on the density of fish near the diversion points. (SWRCB 3, p. X-10 of Appendix I.) With the ability to shift between diversion points, the DWR and the USBR could help protect the fisheries while maintaining their water supply yield.

A number of parties expressed concern with this request, because it has the potential to allow an increase in the net amount of water exported from the Delta by the two projects. This concern is well-founded. The CVP has an excess water supply north of the Delta, but it doesn't

have sufficient conveyance capacity to transport the water to its ultimate place of use south of the Delta. The SWP on the other hand has surplus capacity in its conveyance facilities but an insufficient upstream water supply. Therefore, the excess capacity in the SWP facilities could be used to transport more CVP water for use in its service area. The CVP has limited rights under its water rights permits to use the SWP diversion facilities in the Delta. D-1485 authorizes the CVP to use SWP facilities to make up deficiencies incurred in May and June because of the D-1485 export restrictions. The SWP water rights do not identify the CVP export facilities as an authorized point of diversion or rediversion. (SWRCB 3b, Appendix I, p. X-10.)

An increase in exports could affect the availability of water to other water right holders in the Delta and has the potential to cause significant environmental effects that have not been analyzed. To avoid adverse effects of this change to either water right holders or the environment, the SWRCB will limit its approval of this change. Under the approval, there will be no increase in net water exported because of this change, the use of the alternative diversion points will be allowed only when it will benefit fish resources in the Estuary, and the use of the alternative diversion points will be allowed only if there is no adverse effect on legal users of water and no significant adverse environmental effect. This change will expire upon adoption of a comprehensive water right decision that allocates final responsibilities for meeting the 1995 Bay-Delta objectives or on December 31, 1998, whichever comes first.

If the SWP and the CVP request additional authority to use each other's points of diversion and provide adequate environmental documentation to support their request, the SWRCB will consider further changes in the amount of water that can be diverted and the circumstances under which diversions can be made at each others' diversion points.

4.7 The Need for Terms 3, 7, and 8 of D-1485

The hearing notice asked whether terms 3, 7, and 8 of D-1485 should be deleted. Term 3 authorizes limited use of the SWP diversion facilities by the CVP. Term 7 requires actions for the protection of Suisun Marsh which generally have been completed. Term 8 addresses salinity protections for southern Delta agriculture which were required in 1980. A number of the parties objected to the deletion of these terms. Accordingly, these terms will not be deleted. Term 3, however, is based on the export limits that would be in force under the unamended provisions of D-1485. During the effective period of this order, those export limits will be supplanted by the export limits in the 1995 Bay-Delta Plan. Therefore, Term 3 will be suspended until this order expires.

5.0 ENVIRONMENTAL CONSIDERATIONS

5.1 The Use of the 1995 Bay-Delta Plan Environmental Report

Under CEQA the SWRCB is the lead agency for preparation of environmental documentation on this action. While the DWR could be the lead agency for this action, it

has not assumed that role. It is appropriate for the SWRCB to act as lead agency in this situation.

The SWRCB has prepared environmental documentation (Environmental Report, or ER) in connection with the 1995 Bay-Delta Plan which analyzes the environmental effects of implementing the 1995 Bay-Delta Plan. The 1995 Bay-Delta Plan was prepared in accordance with a program certified under Public Resources Code section 21080.5. Documents that are prepared under programs that have been certified under section 21080.5 are exempt from the requirements for preparing environmental impact reports, negative declarations, and initial studies. Such a document is used as a substitute for an EIR or negative declaration, and regulatory review under a certified program is deemed to be functionally equivalent to the environmental analysis that is otherwise required by CEQA.

The March 30, 1995 supplement to the March 3, 1995 hearing notice for this proceeding states the SWRCB's intent to use the environmental analysis contained in the ER for the 1995 Bay/Delta Plan as the environmental documentation for the current proceeding.

The Environmental Report is a programmatic document which meets the requirements for a Programmatic EIR. (See 14 Cal. Code Regs. § 15168.) Interim implementation of the 1995 Bay-Delta Plan under the SWRCB's water right authority is the next logical action in a chain of contemplated actions. The CEQA regulations direct an agency to prepare a single program EIR where a phased

project is to be undertaken and where the total undertaking comprises a project. The SWRCB believes that a programmatic analysis under a certified program may be used as a basis for subsequent implementing actions without having to prepare additional environmental documents. In response to a request by the SWRCB for an opinion on this issue, the Deputy Secretary and General Counsel of the California Resources Agency responded in a letter dated April 4, 1995 that an environmental analysis prepared under a certified regulatory program can be relied upon for subsequent discretionary actions when the environmental analysis has programmatically disclosed and analyzed the effects of the subsequent action.

Further, the CEQA regulations, at Title 14, California Code of Regulations section 15253, authorize the use of an EIR substitute by a responsible agency, but overlooks the possibility that the agency preparing the substitute document could have a subsequent approval of the same project. If the SWRCB's action under its separate water right authority were carried out by a separate agency, there is no question that the substitute document could serve as an EIR for the water right action, because all of the conditions in section 15253(b) would be met: (1) the SWRCB is the first agency to grant approval, (2) the SWRCB certainly can be deemed to have engaged in consultation between its water quality and water rights authorities, (3) the Environmental Report identifies the significant environmental effects of the action within the water right authority and identifies alternatives and mitigation measures, (4) the SWRCB under its water right authority was fully informed of the substitute document, and (5) the SWRCB under its water quality authority

exercised the powers of a lead agency by considering all the significant effects of the project and making findings under section 15091 for each significant effect.

The environmental impacts of the SWRCB's action on this petition falls within the analysis of impacts recently considered by the SWRCB in the ER for the 1995 Bay-Delta Plan. (SWRCB Exhibit 3b.) The ER is a programmatic document that discloses the specific and cumulative effects of implementing the 1995 Bay-Delta Plan. The various regulatory actions in the Bay-Delta Estuary will provide better protection to the fish and wildlife resources. The implementing regulatory actions include the Biological Opinions for Delta smelt and winter run Chinook salmon, water right changes which are the subject of this proceeding, and future changes to the water rights of water right holders in the watershed of the Estuary.

The ER discusses the water right measures to implement the 1995 Bay-Delta Plan. The analysis of impacts contained in Chapters VII, VIII, XII, and XIII presents the water quality, flow, operational, biological, economic and other impacts related to implementing the 1995 Bay-Delta Plan. The analysis contained in the ER assumes that the objectives in the 1995 Bay-Delta Plan and their implementation are the only regulatory measures that control Delta operations. It assumes that any conflicts between D-1485 and the new objectives in the 1995 Bay-Delta Plan will be removed through SWRCB action. This proceeding removes the remaining impediments to implementation of the 1995 Bay-Delta Plan, which already has largely been implemented through the combined actions of several agencies. Removal of these impediments is necessary

to achieve the transition to the new objectives contained in the 1995 Bay-Delta Plan. Therefore, it is proper to use the ER as the environmental document under CEQA for consideration of the petitions before the SWRCB in this proceeding.

The ER for the 1995 Bay-Delta Plan discloses the environmental impacts of the actions set forth in this order together with the impacts of implementing the other aspects of the 1995 Bay-Delta Plan. Due to the interrelationship of the standards it is not feasible to isolate the impacts of this step in implementation from implementation of the other standards in the 1995 Bay-Delta Plan. To do so would show only minimal effects of this action, but would ignore the larger cumulative impacts of the recent actions of other regulatory agencies to better protect fish and wildlife resources in the Bay-Delta Estuary.

The SWRCB intends to take additional water right actions beyond this proceeding to consider allocating responsibility for meeting Bay-Delta objectives to other water users in the watershed in addition to the CVP and SWP. While the additional water right actions are discussed programmatically in the ER, the SWRCB anticipates that further environmental documentation will be necessary to support that action.

5.2 Significant Environmental Impacts of this Action

Below is a discussion of the impacts that this action will have together with the cumulative impacts of the actions of other agencies to provide better protection to fish and wildlife resources in the Bay-Delta Estuary. A detailed

discussion of these impacts is contained in the ER at Chapters VII (Water Supply Impacts, Chapter VIII (Environmental Impacts), Chapter XII (Economic Impacts) and Chapter XIII (Effects of Preferred Alternative on Special Status Species).

5.2.1 *General Biological and Water Supply Impacts*

The effect of revising the objectives and implementing them is to provide an essential component of the comprehensive regulatory package that will protect the Estuary's beneficial uses. The overall package includes better salinity protection (from saltwater intrusion and agricultural drainage) and improved protections from water project operations that affect flow and entrain fish. (SWRCB 3b, p. 3.) The effect of this order, together with the other regulatory actions, will be to put into effect full implementation of the new objectives on an interim basis.

Within three years, the SWRCB expects to adopt a water right decision that provides long-term protection for the Estuary's beneficial uses and determines the responsibility for meeting these objectives among water right holders within the watersheds of the Estuary. The ER shows that the objectives, when implemented, will improve the protection for fish species, especially in dry years compared with the provisions of D-1485. These additional protections are necessary because the Estuary's fishery resources have been declining precipitously during the past several years.

This order will remain in effect only until the comprehensive water right proceeding is completed. The limited

term of this order avoids any long-term significant environmental effects of this order. During the effective period of this order, improved protections for the Estuary's fisheries will come from increased outflow requirements imposed under the ESA and decreased exports in dry years. This will cause a decrease in water available for out of stream uses. This loss of water supply could result in temporary environmental effects in the areas of water use during the next three years. Any such effects will be short-term effects since this order will remain in effect for no more than three years and this order minimizes the effects through terms and conditions. The benefits of providing protection for fish and wildlife uses in the Estuary during the next three years outweigh any short-term significant environmental effect that could occur due to temporarily implementing the 1995 Bay-Delta Plan.

In wet years the revised requirements actually may provide increased water supplies to areas outside the Estuary compared with exports available under D-1485. There may be some corresponding decrease in environmental protection for estuarine uses in wet years. While the increase in water supply in wet years will help to offset the water supply impacts in dry years, it does not entirely offset these impacts. Overall, however, the new standards are expected to provide better protection to fish and wildlife resources in the Bay-Delta Estuary at the expense of developed water supply.

Some parties have expressed concern that approval of this order will have the effect of allowing the CVP and the SWP to export more water during May, June, and July in wetter periods than they could under the current ESA

requirements (which require compliance with the bulk of the objectives in the Plan) plus D-1485. Increased exports potentially could occur, but during the wetter periods the incremental increases in exports are unlikely to have a significant effect on the environment since there will be more water available for all beneficial uses and the Delta fisheries have generally better protections. During drier periods, less water likely will be exported than under D-1485, providing a benefit to the Estuary's environment. To export larger amounts during drier periods, the inflow would have to increase above historical levels in these periods.

As explained elsewhere in this order, the ER compares the impacts of implementing the 1995 Bay-Delta Plan with D-1485. It does not compare these specific changes with actions taken earlier this year under the ESA. The approach taken in the ER is appropriate, since the ESA actions and this order are consistent and are part of a coordinated state-federal approach to protection of the beneficial uses of the Bay-Delta Estuary. Because the effect of this order is to complete the short-term implementation of the 1995 Bay-Delta Plan, the effects of this individual order should be compared with D-1485, not D-1485 plus the ESA requirements.

If the old export limits in D-1485 remained in place along with the new ones, the CVP and the SWP could incur substantial water costs in wetter years beyond their expectations when they agreed to meet the new limits. It is important to maintain the water supply in the export areas as well as in the Delta, and the need to protect that water supply makes it infeasible to retain the existing

export limitations in D-1485 while putting the new export limits into effect.

Finally, the use of a different CEQA base for comparison that includes both the new ESA requirements which include the export limits plus the D-1485 export limits would be purely theoretical. This physical situation never has existed. Since CEQA requires a comparison with existing conditions, this base would not be appropriate. Further, this theoretical base would not disclose some of the water supply impacts of the new objectives. The ESA requirements have substantial water supply impacts compared with D-1485, especially on users of water from the Stanislaus River. Use of the theoretical base would show very small water supply impacts to these users. The base for comparison used in the ER discloses these impacts.

5.2.2 *San Joaquin River Salinity and Water Supply*

Numerous parties in the hearing argued that the proposed changes could have effects on San Joaquin River water quality in the Delta and water supplies upstream of the Delta. The ER on pages VIII-10 to VIII-24 discusses the environmental effects on water quality and water levels of implementing the new objectives in the San Joaquin River, the central Delta and the southern Delta. The ER on Pages VII-9 to VII-11 discusses the effects on water supply in the San Joaquin River Basin of these standards.

The actions that have the largest effect on flow, water level and water supply along the San Joaquin are the flow requirements of the USBR under the biological opinion

issued by the USFWS for Delta smelt. (SEWD 11, p. 17.) This action which already has been taken by the USFWS to protect this endangered species has a profound effect on the San Joaquin River both in terms of providing better protection to fish and in terms of affecting water supplies upstream that will now be used to meet these higher instream flows. The San Joaquin interests who expressed concerns with the effects of expected new water right conditions for the San Joaquin River Basin were in fact addressing the effects of the biological opinion. (RT Vol. I, pp. 185-189.) Until responsibility for these flows is distributed to additional water users in the San Joaquin watershed these fishery flows may not always be met by the USBR because of the limited water supply capacity of New Melones Reservoir. In this interim period the SWRCB expects that the USBR will continue to honor its water right permit terms to protect prior rights, fisheries and water quality in the Stanislaus River Basin downstream to Vernalis.

This order updates the salinity standard at Vernalis (a monitoring station on the San Joaquin River where it enters the Estuary). The San Joaquin area parties apparently are opposing this updated standard because they cannot, in this proceeding, oppose the flow requirements imposed by the USFWS. The existing salinity standard is contained in the USBR's water right permits for New Melones Reservoir and is intended to protect Delta agriculture. The new standard would provide better protection (lower salinity) to agriculture in the spring and early summer when good water quality is most important and provide slightly worse water quality (higher salinity) in the late summer, fall and winter when water quality is

less critical. The water supply impact of this new standard is the same as the 500 mg/l TDS requirement in D-1422 (RT Vol. I page 199-200). The SWRCB believes that implementing this initial standard at Vernalis will generally improve protections for beneficial uses of water from the San Joaquin River in the Vernalis area.

Neither the plan itself nor the petition requires the USBR to meet the flow objectives during the interim period before the water rights phase is completed. Absent a showing of waste or unreasonable use or impairment of public trust uses, the SWRCB cannot prevent the USBR from varying its operation within the constraints of its water right permits. Although the place of use for consumptive uses of water from New Melones in the USBR's permits is limited to the four county area, the use of water in the Delta for flow and water quality purposes at Vernalis is permitted. The limitation of consumptive uses to the four county area prevents the USBR from selling New Melones water for consumptive uses outside these counties, but it does not preclude the USBR from releasing the water for fish flow and water quality purposes downstream at Vernalis. Nothing in the USBR's water right permits requires the USBR to contract with a particular water user within these counties beyond that needed to protect prior water rights. (SWRCB 3b, Appendix II, p. 30.)

The DWRSIM operation study for the 1995 Bay-Delta Plan objectives assumes that only 70 TAF will be released from New Melones Reservoir to control salinity at Vernalis (SWRCB 3b, Appendix I, p. VIII-61) even though D-1422 requires the USBR to release sufficient water to

achieve the salinity objectives at Vernalis. The assumption is reasonable because salinity control over the long term is unlikely to be achieved exclusively through releases of high quality water from upstream reservoirs. (SWRCB 3b, Appendix II, p. 71.) In the long term, the SWRCB intends to implement the Vernalis salinity objective through a combination of agricultural drainage control and freshwater releases. (SWRCB 3b, Appendix I, p. VIII-61.) Additional measures, including control of saline discharges and discharge of saline water to a salt sink, must also be considered. The SWRCB will consider the issue of salinity control at Vernalis during the comprehensive water right phase of the proceedings. (SWRCB 3b, Appendix II, p. 71.)

A comparison of the modeled salinity at Vernalis between the base case of D-1485 and D-1422 standards and the objectives in the 1995 Bay-Delta Plan over the period 1987 to 1992 is provided in the ER at pages VIII-23 to 24. (SWRCB 3b, Appendix I, p. VIII-23-24.) This analysis assumed that there would te water available on the San Joaquin River to meet all of the flow requirements, as required by the biological opinion for Delta smelt, and that only 70 TAF would be used for salinity control under the base case and the 1995 Bay-Delta Plan. The models indicate that November, December, and January salinity under the 1995 Bay-Delta Plan can rise up to seven percent over the base case and average monthly salinity under the 1995 Bay-Delta Plan will be reduced from the base case by 9 percent in February, 10 percent in April, 14 percent in May, 16 percent in June, 3 percent in July, and 10 percent in October. There is very little difference in the modeled salinities in March, August, and September.

SDWA commented that full compliance with the southern Delta agricultural standards through freshwater releases from upstream projects in addition to New Melones Reservoir should be evaluated before implementing the Vernalis objective. (SDWA 10, p. 3; SWRCB 3b, Appendix II, p. 71.) Such an evaluation is unnecessary for this order since other southern Delta salinity objectives are not now being implemented and the Vernalis objective is equivalent to the D-1422 standard. This order is limited to making the water right permits of the DWR and the USBR consistent with the 1995 Bay-Delta Plan. At this time, such an evaluation would be speculative since the alternative methods to implement these standards in the long term are not yet determined. The SWRCB is not required to speculate about the effects of its future action. (See 14 Cal. Code Regs. § 15145.) The SWRCB will consider the reasonableness of implementing the other southern Delta salinity standards during the water rights phase. (SWRCB 3b, Appendix II, p. 71.)

Objectives to protect the beneficial uses in the southern Delta previously have been implemented largely through releases of fresh water from New Melones Reservoir. The fresh water releases help compensate for diversions of fresh water that have left mainly salty return flows in the San Joaquin River. While fresh water releases from New Melones Reservoir should continue, they do not prevent salts from entering the river. Return flows and drainage from agricultural operations add salts to the San Joaquin River. Also, there has not been enough fresh water available in every year to meet the water quality objectives. Therefore, future actions will be needed to reduce the amounts of salts in the San Joaquin River during periods

when higher levels of salt would violate the objectives. (SWRCB 3b, Appendix I, p. IX-2.) Such actions already have been initiated.

In the 1991 Bay-Delta Plan, the SWRCB directed the Central Valley RWQCB to reduce salt loads to the San Joaquin River by ten percent. The RWQCB responded by requiring drainage operation plans from the areas on the westside of the San Joaquin River with the worst drainage problems. The drainage operation plans focus on water conservation to reduce salt and trace metal loading to the river. (SWRCB 3b, Appendix II, p. 72.)

5.2.3 *Water Levels*

The parties also expressed concerns regarding water levels in the southern and central Delta. The ER describes these impacts on page VIII-24 based on modeling results that use the same assumptions described above for the salinity analysis. Generally, water levels will improve compared with D-1485.

> "According to DWRDSM modeling results (DWR 1995). significant increases in water levels are expected at Vernalis in October and April through June, as a result of the Vernalis flow requirements. On average over the 1987 through 1992 period, the average monthly Vernalis water level increases under the preferred alternative by 0.44 feet in October, by 0.71 feet in April, by 0.93 feet in May, and by 0.86 feet in June. Small decreases in water levels at Vernalis, ranging from 0.15 to 0.21 feet, are seen in November through January. Water levels also increase in February through April on the Old River near

> Middle River and at Tracy, and on the San Joaquin River at Brandt Bridge. DWRDSM results also show decreases in average monthly water level on the Old River near Tracy in May through October. The greatest average decrease in monthly water levels is 0.41 feet in July over the 1987 through 1992 period." (SWRCB 3b, Appendix I, p. VIII-24.)

Although the changes in water levels are generally positive, there may be some times when decreases in water levels will be significant. The ER identifies construction of southern Delta facilities that are being planned by DWR as a possible mitigation measure, but also recognizes that some significant environmental effects could occur.

5.2.4 *Central Delta Salinity*

Central Delta salinity is affected by implementation of a combination of the new objectives. The greatest effect will be caused by the new Delta Cross Channel gate closures to better protect migrating fish species. The effects of implementing the new objectives on central Delta salinity is presented in the ER on pages VIII-17 to VIII-23. In general the new objectives will result in better (lower) salinities in the central Delta than under D-1485 in March through September, and the salinity will comply with the agricultural objectives. In the November through January period salinity increases above those that occur under D-1485 will be due principally to Delta Cross Channel gate closures in these months. These months do not include the primary irrigation season of April 1 through August 15. The increases in salinity in the winter months

are offset by the decreases in the spring and summer months. The exception is at Terminous, where salinity will remain generally high in the spring despite higher flows under the new standards. This suggests that the closure of the Cross Channel has a relatively greater effect there.

Under the new objectives, salinity at central Delta stations (Jersey Point, San Andrea, and Prisoners Point) will increase significantly in November through January at times when the Delta Cross Channel is closed. The increase persists into February when the Delta Cross Channel is closed continuously. The Terminous station shows similar increases but tends to lag by one month. Spring and summer salinity at Jersey Point, San Andrea, Prisoners Point, and Terminous is lower under the 1995 Bay-Delta Plan. The agricultural water quality standards are satisfied within the bounds of model accuracy for the central and northern Delta stations. (SWRCB 3b, Appendix II, p. 82.)

5.2.5 *Dissolved Oxygen*

An additional concern expressed by the City of Stockton was related to the effects of meeting the new objectives on dissolved oxygen in the vicinity of the City of Stockton. (RT Vol. II, p. 288 et seq.) Stockton presented an analysis of the effects on dissolved oxygen if there were no pumping by the CVP and SWP. (Stockton 8.) The incremental impact of the new objectives is much different than those Stockton presented. Water flows in the San Joaquin at Vernalis and water levels due to changes in exports are the two water project related factors that can

affect dissolved oxygen levels. As stated previously, water flows in the San Joaquin River are expected to increase with the new objectives over those which would have occurred under D-1485 and D-1422. These conditions will tend to improve dissolved oxygen levels. There are some small but generally positive effects to water levels, especially near Stockton. This information indicates that dissolved oxygen levels will be affected little if at all by the new standards.

The dissolved oxygen objective was included in the 1995 Bay-Delta Plan to protect fall-run salmon migration in the lower San Joaquin River. (SWRCB 3b, p. 13.) Factors which contribute to low levels of dissolved oxygen in the lower San Joaquin river include: the Stockton Wastewater Treatment Plant; upstream sources of biochemical oxygen demand (BOD); the deepened Stockton ship channel; the commercial use of the dead-end portion of the ship channel; the enlarged turning basin at the Port of Stockton; and low river flows in the fall. Feasible measures to implement the dissolved oxygen objective in the plan include: (1) regulating the effluent discharged from the Stockton Wastewater Treatment plant and other upstream discharges that contribute to the BOD load; (2) providing adequate flows in the San Joaquin River; and (3) installing barriers at locations to increase flows in the river past Stockton. (SWRCB 3b, Appendix I, p. IX-1.)

The 1995 Bay-Delta Plan's objectives for flows in the San Joaquin River at Vernalis, which currently are required under the biological opinion for Delta smelt, are expected to contribute to achieving the dissolved oxygen objective.

The SWRCB will consider additional flow-related measures during the comprehensive water right proceeding. (SWRCB 3b, Appendix I, p. IX-1.)

5.3 Environmental Documentation for Joint Points of Diversion

Significant opportunities exist for the CVP and SWP operations to be modified to provide better protection to fish through the types of coordinated operations allowed under the term proposed in this order. The biological opinions call for the monitoring of fish catches at the export facilities in the southern Delta and the initiation of voluntary actions to reduce take before take limits are exceeded. They rely on the operations group under the CAL/FED process set forth in the Delta smelt Biological Opinion to identify and resolve these issues. (See the Delta smelt Biological Opinion in SEWD Exhibit 11, page 14 and 15.) This proactive and real-time reaction to changing conditions can help provide better protection to fishery resources and forestall the need for more drastic action under the ESA. Without flexibility the CVP and SWP would not willingly provide increased protections to fish, due to the water costs involved. Further, a reduction in water supply to the projects below their current authorization could cause significant environmental effects in the areas that receive water that is exported from the Delta. Therefore, this order allows flexibility in project operations to allow the CVP and SWP to decrease exports in some months and then, through coordinated operations, make up for this decrease in other months.

During the hearing concerns were expressed that allowing the joint points of diversion even for the limited purpose of additional fishery protection would in effect result in increased exports from the southern Delta using water that originated in the Stanislaus River. It was argued that such a proposed term would allow the CVP and SWP to make up water that they would otherwise be required to forgo because of regulatory actions under the flow requirments [sic] of the ESA. The parties argued that this would then result in the USBR failing to meet salinity standards later in the year at Vernalis. These arguments assume that the USBR will purposely violate its water right terms and conditions by delivering water for consumptive uses which it is obligated under its permits to use for salinity control. If the USBR released more water than it is required to release for fish flows, exported it from the Delta, and as a result violated its salinity control obligation, it would open itself to enforcement action. The SWRCB does not presume that the USBR will do this.

The ER does not specifically address the change to joint points of diversion. It does, however, analyze the effects of the two export operations together, rather than individually. Use of a joint point of diversion without limitations would have significant environmental effects. Therefore, this order constrains the use of the joint points of diversion so that (1) this authorization can be used only when coordinated operations using joint points of diversion will benefit fish resources in the Estuary, (2) no water can be exported in excess of that which would have been exported absent this term, and (3) there is no adverse effect on prior rights, water quality or other beneficial uses. These constraints are similar to those

recommended by the JCWU. (WWD & SL&DMWA 1; JCWU closing statement, p. 7 and 8.) Constrained in this manner any environmental effects of the interchangeable points of diversion term will be insignificant. (See RT Vol. II, p. 153.) The concerns expressed during the hearing by the parties opposing the interchangeable points of diversion are addressed by the conditions of this order. The DWR and the USBR specifically stated that they would limit their operations to assure that there would be no net gain in exports. With the conditions in this order incorporated into the approval of the joint points of diversion, no new environmental effects will occur and no mitigation measures are necessary. Therefore, approval of the joint points of diversion is within the scope of the ER, and no new environmental document is required before the SWRCB approves this change.

5.4 Findings Under Public Resources Code Section 21081 and Under Title 14, California Code of Regulations Section 15091

The effect of this order together with the biological opinions issued by the USFWS and the NMFS for Delta smelt and for winter. run Chinook salmon, respectively, is to temporarily implement the 1995 Bay-Delta Plan. As explained in the ER, implementation of the 1995 Bay-Delta Plan could have significant environmental effects. While the measures that are likely to have the greatest effects are not required by this order, the SWRCB recognizes that they have been required by other agencies. The ER, in Chapter X, lists mitigation measures that could mitigate the effects of implementing the 1995 Bay-Delta Plan. These mitigation measures include:

(a) Urban water conservation, including the 16 Best Management Practices for urban water conservation established in the Memorandum of Understanding Regarding Urban Water Conservation in California.

(b) Agricultural water conservation, including water conservation measures formulated under the Efficient Water Management Practices Act of 1990 and conservation goals established by the San Joaquin Valley Drainage Program.

(c) Ground water management, including conjunctive use programs.

(d) Water transfers.

(e) Reclamation, including reclaimed water use for irrigation of agricultural crops, parks, greenbelts, golf courses, and landscape.

(f) Mitigation fund, including a mitigation credits program.

(g) Combined use of CVP and SWP points of diversion in the Delta.

(h) Offstream storage projects, including Los Banos Grandes Reservoir, Demenigoni Valley Reservoir, Los Vaqueros Reservoir, Delta Wetlands, and Mandeville Island.

(i) The South Delta Program being undertaken by the DWR.

(j) Purchase of Delta islands where land subsidence is a problem.

(k) The long-term Delta solution that is the subject of an ongoing federal-state effort.

(l) Construction of a boat lock at the Delta Cross Channel.

With the exception of the combined use of the CVP and SWP points of diversion in the Delta (g), which is approved in this order as part of the petition of the DWR and the USBR, it is not feasible for the SWRCB to require these measures in this order. The reasons are stated below.

The responsibility and jurisdiction of water purveyors and managers covers most of these mitigation measures. Some are primarily within the responsibility of the DWR and the USBR. The SWRCB could require implementation of the water conservation measures in (a) and (b) as part of an enforcement proceeding such as the forthcoming comprehensive water right proceeding, but these measures should be permanent, and this order is temporary. Further, the scope of this proceeding on the change petition is too narrow to address these measures now. Finally, the DWR already has statutory responsibilities with respect to these measures which it can and should carry out. The ground water management programs mentioned in (c) are likewise beyond the scope of this proceeding and are within the responsibility of local agencies. Absent an enforcement action or a ground water adjudication, the SWRCB lacks authority to require ground water management. While the SWRCB must approve many of the water transfers in (d), water right holders must initiate them. Consideration of new reclamation programs in (e) must be initiated by the reclaimer, although the SWRCB may take action in specific cases to prevent waste or unreasonable use of water. Establishment of the proposed mitigation fund at (f) likely would require legislative approval before the SWRCB could implement it, and would have to include any other water users who will

have responsibilities for meeting objectives in the 1995 Bay-Delta Plan. Construction of the offstream storage projects in (h) require the approval of the SWRCB, but the SWRCB does not have authority to initiate these projects. The DWR already is conducting the South Delta Program in (i), and the measures in this program are outside the authority of the SWRCB except to the extent that an element of the program may require approval of the SWRCB. The DWR and several other state agencies could purchase Delta islands with subsidence [sic] problems (j), but the SWRCB cannot order DWR or other agencies specifically to make such a purchase. The long-term Delta solution in (k) is being developed by agencies with responsibility for physical facilities and is not within the authority of the SWRCB except to the extent that a proposed measure may require the approval of the SWRCB. The possibility of a boat lock at the Delta Cross Channel (1) is a long-term measure that the SWRCB could require as mitigation in a long-term action, but this would not be appropriate in this short-term action.

6.0 CONCLUSIONS

Based on the foregoing, the SWRCB concludes as follows:

1. The base for environmental analysis of this order is D-1485.

2. The water quality standards for fish and wildlife set forth in D-1485 for striped bass spawning, Suisun Marsh and the operational constraints (export limits and Delta Cross Channel gate closures) can be replaced with the standards set forth in Attachment B without having significant environmental or water

supply effects beyond those identified in the 1995 Bay-Delta Plan, Appendix I.

3. Many of the significant environmental and water supply effects of implementing the 1995 Bay-Delta Plan were caused by the actions taken under the ESA. This order does not add to the environmental and water supply effects caused by other agencies.

4. The proposed change in the salinity standard in D-1422 for the Vernalis station will improve conditions for agriculture in the southern Delta.

5. As approved in this order, the use of joint points of diversion by the DWR and the USBR will have no significant environmental effect and will provide benefits to the Delta fisheries.

6. To ensure that any environmental effects of this order are temporary, this order will remain in effect only until December 31, 1998 and may expire earlier if it is replaced by a new water right decision.

7. A review of the Suisun Marsh water quality standards should be conducted by the interested parties to make recommendations to the SWRCB before the completion of the comprehensive water right proceeding, and before the compliance dates, for any changes and implementation measures needed to ensure protection of beneficial uses in the Suisun Marsh.

ORDER

IT IS HEREBY ORDERED THAT:

1. This order is an interim order. In the absence of a further order of the SWRCB, the amendments herein to the terms and conditions in the affected permits shall expire upon adoption of a comprehensive water right decision that allocates final responsibilities for

meeting the 1995 Bay-Delta objectives or on December 31, 1998, whichever comes first.

2. The water quality standards for fish and wildlife set forth in Water Right Decision 1485 (D-1485), Table II, for striped bass spawning, Suisun Marsh, and operational constraints (export rates and Delta Cross Channel gate operations) are replaced with those contained in Attachment B below. All other provisions of D-1485 except as specified below remain in full force and effect.

3. Permittees shall work with other interested groups and agencies to review the Suisun Marsh water quality standards, implementation dates and other agencies' responsibilities to help meet these standards. They shall publicly notice all meetings at least ten days in advance and shall use the SWRCB's active party mailing list for the Bay-Delta proceedings for the first three meetings following adoption of this order. Thereafter, they shall use a mailing list that includes those parties who indicate an interest in participating. The review also shall address the issues raised in the program of implementation at pages 40-41 of the 1995 Bay/Delta Plan. Permittees shall report the results of this review to the SWRCB by August 1997.

4. Condition 5 of water right Decision 1422 (D-1422) is modified to read as follows:

   Releases of conserved water from New Melones Reservoir for water quality control purposes shall be scheduled so as to maintain a maximum 30-day running average of mean daily electrical conductivity in the San Joaquin River at Vernalis of 0.7 mmhos/cm during April through August and 1.0 mmhos/cm during September through March as specified in the Water Quality Control Plan for the San Francisco

Bay/Sacramento-San Joaquin Delta Estuary and a dissolved oxygen concentration in the Stanislaus River as specified in the Water Quality Plan, San Joaquin River Basin 5C.

In the event that either Water Quality Control Plan is amended or superseded, the foregoing water quality objectives shall be modified to conform to then current criteria.

5.a. Condition 3 of D-1485 is revised temporarily to provide, in the permits of the DWR:

In addition to all other points of diversion or rediversion authorized by this permit, permittee may divert water at the Clifton Court Forebay, located within the NW1/4 of the SE 1/4 of Projected Section 20, T1S, R4E, MDB&M, and (with the approval of the USBR) at the Tracy Pumping Plant, located within the SW 1/4 of the SW 1/4 of Projected Section 31, T1S, R4E, MDB&M.

Permittee may use the Tracy Pumping Plant only when, to improve fish protections, exports are reduced below the applicable export limits set forth in Attachment B. Under these circumstances, the permittee shall be allowed to make up such reductions during other periods of the year by direct diversion or rediversion of stored water through the CVP export facilities in the southern Delta, if the following conditions are met:

(1) the coordinated operations shall not result in an increase in annual exports above that which would have been exported in the absence of the coordinated operations,

(2) the other effective provisions of the permittee's water right permits all are met,

(3) any increase in diversions by all DWR diversions at both the Banks and Tracy pumping plants above 10,350 cfs is offset by diversions below 10,350 cfs within a 6 month period,

(4) the shift in exports does not adversely affect any legal user of water or cause significant environmental effects on fish and wildlife or water quality; and

(5) the pumping at the Tracy pumping plant shall not at any time exceed 4,600 cfs and the pumping at the Banks pumping plant shall not at any time exceed 10,350 cfs.

This term allows the use of coordinated operations in anticipation of future reductions in exports. Before such changes are made the permittee shall consult with a committee composed of representatives of all parties who indicate an interest in participating, including but not limited to the Department of Fish and Game, the United States Fish and Wildlife Service, and the National Marine Fisheries Service. The CALFED Operations Group established under the Framework Agreement would satisfy this requirement. If the CALFED Operations Group is used, disputes within the operations group shall be given to the CALFED policy group for resolution. Permittee shall submit agreements on coordinated operations under this authorization to the Executive Director for approval and shall also submit complete documentation showing that no additional water will be exported through use of the Tracy Pumping Plant, including the method used to make this determination. Authority is hereby delegated to the Executive Director to act on the proposal provided the conditions set forth above are met.

5.b. Condition 3 of D-1485 is revised temporarily to provide, in the permits of the USBR:

In addition to all other points of diversion or rediversion authorized by this permit, permittee may divert water (with the approval of the DWR) at the Clifton Court Forebay, located within the NW1/4 of the SE 1/4 of Projected Section 20, T1S, R4E, MDB&M, and at Italian Slough, located within the NW 1/4 of the NE 1/4 of Projected Section 24, T1S, R3E, MDB&M.

Permittee may use the Harvey O. Banks Pumping Plant only when, to improve fish protections, exports are reduced below the applicable export limits set forth in Attachment B. Under these circumstances, the permittee shall be allowed to make up such reductions during other periods of the year by direct diversion or rediversion of stored water through the SWP export facilities in the southern Delta, if the following conditions are met:

(1) the coordinated operations shall not result in an increase in annual exports above that which would have been exported in the absence of the coordinated operations,

(2) the other effective provisions of the permittee's water right permits all are met,

(3) any increase in diversions by all USBR diversions at both the Banks and Tracy pumping plants above 4,600 cfs from the Delta and 4,200 cfs to storage in San Luis Reservoir is offset by diversions below these amounts within a six-month period,

(4) the shift in exports does not adversely affect any legal user of water or cause significant environmental effects on fish and wildlife or water quality; and

(5) the pumping at the Tracy pumping plant shall not at any time exceed 4,600 cfs and the pumping

at the Banks pumping plant shall not at any time exceed 10,350 cfs.

This term allows the use of coordinated operations in anticipation of future reductions in exports. Before such changes are made the permittee shall consult with a committee composed of representatives of all parties who indicate an interest in participating, including but not limited to the Department of Fish and Game, the United States Fish and Wildlife Service, and the National Marine Fisheries Service. The CALFED Operations Group established under the Framework Agreement would satisfy this requirement. If the CALFED Operations Group is used, disputes within the operations group shall be given to the CALFED policy group for resolution. Permittee shall submit agreements on coordinated operations under this authorization to the Executive Director for approval and shall also submit complete documentation showing that no additional water will be exported through use of the Harvey O. Banks Pumping Plant, including the method used to make this determination. Authority is hereby delegated to the Executive Director to act on the proposal provided the conditions set forth above are met.

CERTIFICATION

The undersigned, Administrative Assistant to the Board, does hereby certify that the foregoing is a full and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on June 8, 1995.

AYE:	John P. Caffrey Mary Jane Forster James M. Stubchaer John W. Brown
NO:	None
ABSENT:	Marc Del Piero
ABSTAIN:	None

/s/ Maureen Marché
Maureen Marché
Administrative Assistant
to the Board

ATTACHMENT A

D-1485 PERMITS OF DEPARTMENT OF WATER RESOURCES

Application Number	Permit Number
5629	16477
5630	16478
14443	16479
14444	16480
14445A	16481
17512	16482
17514A	16483

PERMITS OF UNITED STATES BUREAU OF RECLAMATION

D-1485 PERMITS

Application Number	Permit Number
5625	12720
5626	12721
5627	11966
5628	11967
9363	12722
9364	12723
9365	12724
9366	12725
9367	12726
9368	12727
13370	11315
13371	11316
13372	11317
14662	11318
15374	11968
15375	11969
15376	11970
15764	12860
16767	11971

16768	11972
17374	11973
18721	16209
18723	16210
21542	15149
21636	16211
21637	16212
22316	15735

D-1422 PERMITS

Application Number	Permit Number
14858A	16597
14859	16598
19303	16599
19304	16600

ATTACHMENT B

WATER QUALITY STANDARDS FOR
THE SACRAMENTO-SAN JOAQUIN DELTA AND SUISUN MARSH

COMPLIANCE LOCATION	INTERAGENCY STATION NUMBER (RKI [1])	PARAMETER	DESCRIPTION (UNIT) [2]	WATER YEAR TYPE [3]	TIME PERIOD	VALUE
SAN JOAQUIN RIVER SALINITY						
San Joaquin River at and between Jersey Point and Prisoners Point [4]	D-15 (RSAN018) -and- D-29 (RSAN038)	Electrical Conductivity (EC)	Maximum 14-day running average of mean daily EC (mmhos/cm)	W.AN.BN.D	Apr-May	0.44 [5]
EASTERN SUISUN MARSH SALINITY						
Sacramento River at Collinsville -and- Montezuma Slough at National Steel -and- Montezuma Slough near Beldon Landing	C-2 (RSAC081) S-64 (SLMZU25) S-49 (SLMZU11)	Electrical Conductivity (EC)	Maximum monthly average of both daily high tide EC values (mmhos/cm), or demonstrate that equivalent or better protection will be provided at the location	All	Oct Nov-Dec Jan Feb-Mar Apr-May	19.0 15.5 12.5 8.0 11.0
WESTERN SUISUN MARSH SALINITY						
Chadbourne Slough at Sunrise Duck Club -and- Suisun Slough, 300 feet south of Volanti Slough -and- Cordelia Slough at Ibis Club -and- Goodyear Slough at Morrow Island Clubhouse -and- Water supply intakes for waterfowl management areas on Van Sickle and Chipps Islands	S-21 [6] (SLCBN1) S-42 [7] (SLSUS12) S-97 [7] (SLCRD06) S-35 [7] (SLGYR03) No locations specified	Electrical Conductivity (EC)	Maximum monthly average of both daily high tide EC values (mmhos/cm), or demonstrate that equivalent or better protection will be provided at the location	All but deficiency period	Oct Nov Dec Jan Feb-Mar Apr-May	19.0 16.5 15.5 12.5 8.0 11.0
				Deficiency period [8]	Oct Nov Dec-Mar Apr May	19.0 16.5 15.6 14.0 12.5

COMPLIANCE LOCATION	INTERAGENCY STATION NUMBER (RKI [1])	PARAMETER	DESCRIPTION (UNIT) [2]	WATER YEAR TYPE [3]	TIME PERIOD	VALUE
EXPORT LIMITS						
		Combined export rate [9]	Maximum 3-day running average (cfs)	All	Apr 15 May 15 [10]	[11]
			Maximum percent of Delta inflow diverted [12][13]	All	Feb-Jun	35% Delta inflow [14]
				All	Jul-Jan	65% Delta inflow
DELTA CROSS CHANNEL GATES CLOSURE						
Delta Cross Channel at Walnut Grove	—	Closure of gates	Close gates	All	Nov-Jan Feb-May 20 May 21- Jun 15	[15] — [16]

Attachment B Footnotes

[1] River Kilometer Index station number.

[2] Determination of compliance with an objective expressed as a running average begins on the last day of the averaging period. If the objective is not met on the last day of the averaging period, all days in the averaging period are considered out of compliance.

[3] The Sacramento Valley 40-30-30 Water Year Hydrologic Classification Index (see Footnote 3 for Attachment B) applies unless otherwise specified.

[4] Compliance will be determined at Jersey Point (station D15) and Prisoners Point (station D29).

[5] This standard does not apply in May when the best available May estimate of the Sacramento River Index for the water year is less than 8.1 MAF at the 90% exceedence level [Note: The Sacramento River Index refers to the sum of the unimpaired runoff in the water year as published in the DWR Bulletin 120 for the following locations: Sacramento River above Bend Bridge, near Red Bluff; Feather River, total unimpaired inflow to Oroville Reservoir; Yuba River at Smartville; and American River, total unimpaired inflow to Folsom Reservoir.]

[6] The effective date for objectives for this station is October 1, 1995.

[7] The effective date for objectives for this station is October 1, 1997.

[8] A deficiency period is: (1) the second consecutive dry water year following a critical year; (2) a dry water year following a year in which the Sacramento River Index (described in footnote 5) was less than 11.35; or (3) a critical water year following a dry or critical water year.

[9] Combined export rate for this objective is defined as the Clifton Court Forebay inflow rate (minus actual Byron-Bethany Irrigation District diversions from Clifton Court Forebay) and the export rate of the Tracy pumping plant.

[10] This time period may be varied based on real-time monitoring. The time period for this 31-day export limit will be determined by the operations group established under the Framework Agreement.

[11] Maximum export rate is 1,500 cfs or 100% of 3-day running average of San Joaquin River flow at Vernalis, whichever is greater. This export restriction does not supersede the export restriction of 35% of Delta inflow. The more restrictive of these two objectives applies from April 15 to May 15. Variations to this maximum export rate are authorized if agreed to by the operations group established under the Framework Agreement. This flexibility is intended to result in no net water supply cost annually within the limits of the water quality and operational requirements of this plan. Variations may result from recommendations of agencies for protection of fish resources, including actions taken pursuant to the State and federal Endangered Species Acts. Disputes within the operations group will be resolved by the CALFED policy group. Any agreement on variations will be effective immediately and will be presented to the Executive Director of the SWRCB. If the Executive Director does not object to the variations within 10 days, the variations will remain in effect.

[12] Percent of Delta inflow diverted is defined in Footnote 12 for Attachment B. For the calculation of maximum percent Delta inflow diverted, the export rate is a 3-day running average and the Delta inflow is a 14-day running average, except when

the CVP or the SWP is making storage withdrawals for export, in which case both the export rate and the Delta inflow are 3-day running averages.

[13] The percent Delta inflow diverted values can be varied either up or down. variations are authorized subject to the process described in footnote 11.

[14] If the best available estimate of the Eight River Index for January is less than or equal to 1.0 MAF, the export limit for February is 45% of Delta inflow. If the best available estimate of the Eight River Index for January is greater than 1.5 MAF, the February export limit is 35% of Delta inflow. If the best available estimate of the Eight River Index for January is between 1.0 MAF and 1.5 MAF, the export limit for February will be set by the operations group established under the Framework Agreement within the range of 35% to 45%. Disputes within the operations group will be resolved by the CALFED policy group. [Note: The Eight River Index refers to the sum of the unimpaired runoff as published in the DWR Bulletin 120 for the following locations: Sacramento River flow at Bend Bridge, near Red Bluff; Feather River, total inflow to Oroville Reservoir; Yuba River flow at Smartville; American River, total inflow to Folsom Reservoir; Stanislaus River, total inflow to New Melones Reservoir; Tuolumne River, total inflow to Don Pedro Reservoir; Merced River, total inflow to Exchequer Reservoir; and San Joaquin River, total inflow to Millerton Lake.]

[15] For the November-January period, close Delta Cross Channel gates for up to a total of 45 days, as needed for the protection of fish. The timing of the gate closure will be determined by the operations group established under the Framework Agreement.

[16] For the May 21-June 15 period, close Delta Cross Channel gates for a total of 14 days. The timing and duration of the gate closure will be determined by the operation group established under the Framework Agreement. Variations in the number of days of gate closure are authorized if agreed to by the operations group established under the Framework Agreement. Variations shall result from recommendations from agencies for the protection of fish resources, including actions taken pursuant to the state and federal Endangered Species Acts. The process for the approval of variations shall be similar to that described in footnote 11.

FOOTNOTE 3 FOR ATTACHMENT B

Sacramento Valley
Water Year Hydrologic Classification

Year classification shall be determined by computation of the following equation

$$INDEX = 0.4 \bullet X + 0.3 \bullet Y + 0.3 \bullet Z$$

Where: X = Current year's April-July Sacramento Valley unimpaired runoff

Y = Current October-March Sacramento Valley unimpaired runoff

Z = Previous year's index[1]

The Sacramento Valley unimpaired runoff for the current water year (October 1 of the preceding calendar year through September 30 of the current calendar year), as published in California Department of Water Resources Bulletin 120, is a forecast of the sum of the following locations: Sacramento River above Bend Bridge, near Red Bluff; Feather River, total inflow to Oroville Reservoir; Yuba River at Smartville; American River, total inflow to Folsom Reservoir. Preliminary determinations of year classification shall be made in February, March, and April with final determination in May. These preliminary determinations shall be based on hydrologic conditions to date plus forecasts of future runoff assuming nominal precipitation for the remainder of the water year.

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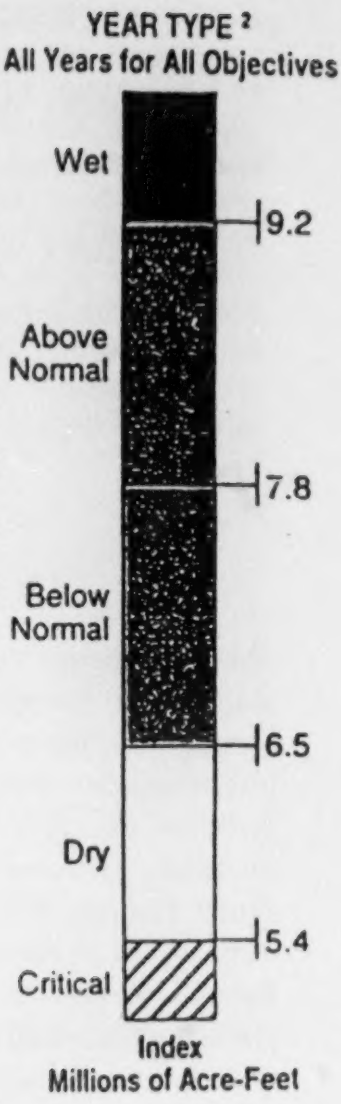
[1] A cap of 10.0 MAF is put on the previous year's index (Z) to account for required flood control reservoir releases during wet years

Classification	Index Millions of Acre-Feet (MAF)
Wet.....	Equal to or greater than 9.2
Above Normal	Greater than 7.8 and less than 9.2
Below Normal	Equal to or less than 7.8 and greater than 6.5
Dry.....	Equal to or less than 6.5 and greater than 5.4
Critical.....	Equal to or less than 5.4



[2] The year type for the preceding water year will remain in effect until the initial forecast of unimpaired runoff for the current water year is available.

FOOTNOTE 12 FOR ATTACHMENT B

PERCENT INFLOW DIVERTED[2]

The percent inflow diverted, as described in this footnote, shall be computed daily by the DWR and the USBR using the following formula (all flows are in cubic feet per second):

PERCENT INFLOW DIVERTED =
(CCF + TPP) + DELTA INFLOW

where

CCF[3]	=	Clifton Court Forebay inflow for the current day.
TPP	+	Tracy Pumping Plant pumping for the current day.

and where DELTA INFLOW = SAC + SRTP + YOLO + EAST + MISC + SJR

SAC	=	Sacramento River at Freeport mean daily flow for the previous day; the 25-hour tidal cycle measurements from 12:00 midnight to 1:00 a.m. may be used instead.
SRTP	=	Sacramento Regional Treatment Plant average daily discharge for the previous week.

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[2] Not all of the Delta tributary streams are gaged and telemetered. When appropriate, other methods of estimating stream flows, such as correlations with precipitation or runoff from nearby streams, may be used instead.

[3] Actual Byron-Bethany Irrigation district withdrawals from Clifton Court Forebay shall be subtracted from Clifton Court Forebay inflow.

YOLO	=	Yolo Bypass mean daily flow for the previous day, which is equal to the flows from the Sacramento Weir, Fremont Weir, Cache Creek at Rumsey, and the South Fork of Putah Creek.
EAST	=	Eastside Streams mean daily flow for the previous day from the Mokehumne River at Woodbridge, Cosumnes River at Michigan Bar, and Calaveras River at Bellota.
MISC	=	Combined mean daily flow for the previous day of Bear Creek, Dry Creek, Stockton Diverting Canal, French Camp Slough, Marsh Creek, and Morrison Creek.
SJR	=	San Joaquin River flow at Yernalis, mean daily flow for the previous day.

APPENDIX 6

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Attorneys for Respondents

SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SACRAMENTO

COUNTY OF SAN JOAQUIN, STOCKTON EAST WATER DISTRICT, CENTRAL SAN JOAQUIN WATER CONSERVATION DISTRICT, CENTRAL DELTA WATER AGENCY, SOUTH DELTA WATER AGENCY, RECLAMATION DISTRICT NO. 2072, R.C. FARMS, INC. and ALEXANDER HILDEBRAND, Petitioners,	No. 95 CS 01642 JUDGMENT OF DISMISSAL

vs.

STATE WATER RESOURCES CONTROL BOARD; JOHN P. CAFFREY; MARC DEL PIERO; JAMES M. STUBCHAER; MARY JANE FORSTER; JOHN W. BROWN; AND DOES 1 through 10, inclusive,

Respondents.

UNITED STATES OF AMERICA, acting by and through the DEPARTMENT OF THE INTERIOR, BUREAU OF RECLAMATION; STATE OF CALIFORNIA, acting by and through the RESOURCES AGENCY, DEPARTMENT OF WATER RESOURCES; and DOES 11 THROUGH 300.

Real Parties In Interest.

The Court, having issued its February 6, 1996 Ruling on Submitted Matter; having granted Respondents' Motion for Judgment on the Pleadings; and, having ruled that the United States Bureau of Reclamation is an indispensable party to this litigation under Code of Civil Procedure section 389 which cannot be joined in this action because of the sovereign immunity of the United States;

Now, Therefore, it is ORDERED, ADJUDGED AND DECREED that:

1. This action shall be, and hereby is, dismissed without prejudice;

2. Petitioners, and each of them, shall take nothing by this action;

3. All parties shall bear their own costs of suit, with the costs of preparing and submitting the administrative record in this action to be borne by petitioners.

Dated: FEB 21 1996

/s/ Thomas M. Cecil
Thomas M. Cecil
JUDGE OF THE
SUPERIOR COURT

Approved as to form on behalf of Petitioners:

/s/ Jeanne M. Zolezzi
Jeanne M. Zolezzi
Counsel for Petitioner
Stockton East Water District

APPENDIX 7

PRINCIPLES FOR AGREEMENT ON BAY-DELTA STANDARDS BETWEEN THE STATE OF CALIFORNIA AND THE FEDERAL GOVERNMENT

Preamble

In order to provide ecosystem protection for the Bay-Delta Estuary, representatives of the State and Federal governments and urban, agricultural and environmental interests agree to the implementation of a Bay-Delta protection plan through the California State Water Resources Control Board (SWRCB) consistent with the following principles. These Principles described changes to the California Urban Water Agency/Agricultural water Users (CUWA/AG) proposal as the base case for Bay-Delta protections, which are intended to be in force for three years, at which time they may be revised.

Water Quality Standards and Operational Constraints

1. *February Protections:* Subject to the flexibility provisions described below, the exports during February shall be no greater than 35% of Delta inflow in years when the January Eight River Index is greater than 1.5 million acre feet (MAF). If this index is less than 1 MAF, the allowable exports will be 45% of Delta inflow. If this index is between 1 and 1.5 MAF, operational decisions will be made by the California Water Policy Council and Federal Ecosystem Directorate (CALFED) Coordination Group (Ops Group) as set forth in the Exhibit B of the Framework Agreement of June 1994. (The CALFED process is described in Attachment A.)

2. *March through June Protections:* During March through June, exports shall be no greater than 35% of

Delta inflow, subject to the flexibility provisions described below.

3. *July through January:* During July through January exports shall be no greater than 65% of Delta inflow, subject to the flexibility provision is described below. Criteria for exercising this flexibility will be developed by the Ops Group.

4. *X-2 Protection Measures:* X-2 protection shall be based on the CUWA/AG proposal with the following adjustment. The Chipps Island requirement in February will be zero days when the Eight River Index in January is less than 0.8 MAF and 28 days when it is greater than 1.0 MAF with linear interpolation between 0.8 and 1.0 MAF. The requirement at the confluence shall be 150 days, except that when the May 1 90% forecast of the Sacramento River Index is less than 8.1 MAF, the maximum outflows for May and June shall be 4,000 cfs, with all other flow requirements removed. When the February index falls below 0.5 MAF, the requirement for March will be reviewed by the Ops Group. Additional refinements, which will involve no further water costs above those which are required for this paragraph may subsequently be made.

5. *San Joaquin River Protection Measures:* The protection measures will consist of the narrative standard and implementation provisions agreed to on December 12, 1994 (Attachment B). In addition, export limits during the April/May 30-day pulse flow period will be consistent with the CUWA/AG proposal. The parties agree to take immediate actions, as appropriate, to resolve the biological concerns related to the removal of the barrier and to

provide adequate transport of fisheries consistent with the CALFED process identified in Attachment C. If biological problems arise before the solution(s) can be implemented, resolution of these concerns shall be made within CALFED.

6. *Additional Modifications to CUWA/AG Proposal:* Daily export limits shall be based on the average Delta inflow over the preceding three days under balanced conditions as defined in the Coordinated Operation Agreement or fourteen days under unbalanced conditions.

During the period November to January, the Delta Cross Channel will be closed a maximum of 45 days. The timing and duration of the closures will be determined by the Ops Group.

During the period May 21 through June 15, the Delta Cross channel may be rotated closed four days and open three days, including the weekend.

ESA FLEXIBILITY

1. *No Additional Water Cost:* Compliance with the take provisions of the biological opinions under the Federal Endangered species Act (ESA) is intended to result in no additional loss of water supply annually within the limits of the water quality and operational requirements of these Principles. To implement this principle, the Ops Group will develop operational flexibility through adjustment of export limits.

2. *Real Time Monitoring:* To the maximum extent possible, real time monitoring will be used to make decisions regarding operational flexibility. CALFED commits to aggressively develop more reliable mechanisms for real time monitoring.

3. *Additional Study Programs:* CALFED commits to aggressively pursue study programs to develop information allowing better decisions to be made about managing the Estuary and its watershed.

4. *Operational Flexibility:* Decisions to exercise operational flexibility under the Ops Group process may increase or decrease water supplies in any month and must be based on best available data to ensure biological protection and be consistent with the Federal and State Endangered Species Acts.

5. *Dispute Resolution:* Any disputes within the Ops Group will be resolved by CALFED, as set forth in Attachment A.

CATEGORY III – NON FLOW FACTORS

1. *Principles:* Implementation of Category III principles will be consistent with the principles set forth in Attachment C.

2. *Financial Commitment:* The water user community agrees to make available by February 15, 1995, an initial financial commitment of $10 million annually for the three years of these interim standards to fund Category III activities. Metropolitan Water District of Southern California (MWD) will guarantee this commitment. Subsequent financial agreements relative to Category III will

credit this early commitment of funds to MWD's obligation.

INSTITUTIONAL AGREEMENTS

1. *EPA Standards:* Consistent with the Framework Agreement, EPA commits to withdraw Federal Standards pursuant to the Clean Water Act when the SWRCB adopts a final plan consistent with these Principles.

2. *Endangered Species Act*

a. *Limitation To Aquatic Species:* These Principles apply only to aquatic species affected in the Bay-Delta Estuary.

b. *Impacts of Additional Listings:* This Plan, in conjunction with other Federal and State efforts, is intended to provide habitat protection sufficient for currently listed threatened and endangered species and to create conditions in the Bay-Delta Estuary that avoid the need for any additional listings during the next three years. To the extent that due to unforeseen circumstances in the Estuary, or to factors not addressed in the Plan, additional listings may be required, it is understood that protection of these species shall result in no additional water cost relative to the Bay-Delta Protections embodied in the Plan and will, to the maximum extent possible, use the flexibility provided within Section 4(d) of the ESA. Additional water needs will be provided by the federal government on a willing seller basis financed by Federal funds, not through additional regulatory re-allocations of water within the Bay-Delta.

c. *Other Endangered Species Issues:* To the extent consistent with the requirements of Federal and State ESAs, all other actions related to this Plan required to implement the Acts as they affect the Bay-Delta, including but not limited to future biological opinions, incidental take statements, recovery plans, listing decisions and critical habitat designations, are intended to conform to these Principles, and decisions regarding ESA implementation will be made utilizing the CALFED process.

3. *Central Valley Project Credits:* All CVP water provided pursuant to these Principles shall be credited toward the CVP obligation under Section 3406(b)(2) of the Central Valley Project Improvement Act to provide 800,000 acre feet of project yield for specified purposes.

4. *Immediate Implementation:*

a. *Biological Opinions:* It is agreed that there will be an immediate reconsultation on the biological opinions currently governing project operations with appropriate modifications by the end of 1994, to the extent practicable, to conform with the requirements of these principles.

b. *State Implementation:* Consistent with the Framework Agreement, the SWRCB will finalize the Plan and immediately thereafter initiate water right proceedings to implement the adopted Plan. In implementing the Plan, the SWRCB will act in compliance with all provisions of law which may be applicable, including, but not limited to, the water rights priority system and the statutory protections for areas of origin.

5. *SWRCB Authority:* Variations in the operational criteria approved by the CALFED process in accordance

with the above provisions will be communicated to the Executive Director of the SWRCB for appropriate action, if any, if [sic] accordance with the Plan.

6. *Authority under State and Federal ESA's:* Any actions or decisions of the Ops Group or CALFED which would create or alter requirements under the State or Federal ESA's shall be communicated, as appropriate, to the U.S. Fish and Wildlife Service, National Marine Fisheries Service, or California Department of Fish and Game for appropriate processing consistent with the provisions of the State and Federal ESA's.

7. *Legal Consistency:* All provisions of this agreement are intended and shall be interpreted to be consistent with all applicable provisions of State and federal law.

/s/ Douglas B. Wheeler
Douglas B. Wheeler
Secretary, California
Resources Agency

/s/ Bruce Babbitt
Bruce Babbit
Secretary of the Interior

/s/ James M. Strock
James M. Strock
Secretary for
Environmental Protection
California Environmental
Protection Agency

Ronald H. Brown
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/s/ Carol M. Browner
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/s/ David R. Schuster
David R. Schuster
Kern County Water Agency and
Tulare Lake Water Storage District

/s/ John R. Wodraska
John R. Wodraska
Metropolitan Water District
of Southern California

Attachment A

The "CALFED process" referred to herein consists of the following steps:

Initial deliberations and decisions occur in the "Ops Group." "Ops Group" deliberations shall be conducted in consultation with water user, environmental and fishery representatives.

If the Ops Group disagrees on a particular issue, or if an Ops Group action requires additional water that it is believed cannot be made up within existing requirements, the issue will be decided by CALFED.

If CALFED cannot reach agreement, and if the issue involves listed species, a final decision will be made by the appropriate listing agency. Other issues not involving ESA will be decided by the appropriate regulatory or resources management agency.

Attachment B

Narrative Criteria for Chinook Salmon on the Sacramento and San Joaquin Rivers

Water quality conditions shall be maintained, together with other measures in the watershed, sufficient to achieve a doubling of production of chinook salmon, consistent with the mandates of State and Federal law.

Implementation Measures – San Joaquin River System

1. Not later than three years following adoption of this Plan the SWRCB shall assign responsibility for the following flows, together with other measures in the watershed sufficient to meet the narrative criteria, in the San Joaquin River at Vernalis among the water right holders in the watershed. During this three-year period, the bureau of Reclamation shall provide these flows, in accordance with the biological opinion for Delta smelt. These flows are interim flows and will be reevaluated as to timing and magnitude (up or down) within the next 3 years.

	Feb-June Flows (cfs)*	April-May pulse flows (cfs)*
C	710-1140	3110-3540
D	1420-2280	4020-4880
BN	1420-2280	4620-5480
AN	2130-3420	5730-7020
W	2130-3420	7330-8620

* higher flows provided when the 2 ppt isohaline (x2) is west of Chipps Island.

2. Install a barrier at the head of Old River during the April-May pulse flows.

3. During the 3-year period, decisions by the Federal energy Regulatory Commission (FERC) or other regulatory orders may increase the contribution from other upstream water users into the Estuary. These additional flows will benefit the Delta resources. These flows will be recognized by ClubFED in its calculation of flows available to the Delta and be considered by the SWRCB in its assignment of responsibility among the water rights holders in the watershed during its water rights proceeding.

The SWRCB will initiate a water rights proceeding to assign responsibility for meeting these flow requirements. Actions of the NMFS and FWS in the FERC proceedings will be in furtherance of their authority and responsibility under the ESA. Such actions shall not be intended to assume the responsibility of the SWRCB to assign responsibility for meeting water quality standards in the Delta.

Sacramento River System – Additional Measures

Close the Delta Cross Channel gates from February-May 20, and during half of the period from May 20-June 15.

Attachment C

PRINCIPLES FOR IMPLEMENTATION OF CATEGORY III

The State and Federal governments and agricultural, urban and environmental interests are committed to the implementation and financing of "Category III" measures

as an essential part of a comprehensive ecosystem protection plan for the Bay-Delta Estuary.

To achieve this objective we agree to the following principles:

1) **Level of funding:**
Category III activities are expected to require a financial commitment estimated to be $60 million a year.

2) **Sources of funds:**
It is anticipated that new sources of funds will be required to adequately finance Category III activities. A process for evaluating existing funding and possible reprioritization will be used to finance a portion of Category III activities. Additional funds will be secured through a combination of Federal and State appropriations, user fees, and other sources as required.

3) **Monitoring:**
It is further agreed that monitoring is a high priority in addition to the Category III elements, and has a high priority for separate funding.

4) **Unscreened Diversions:**
It is agreed that the highest priority Category III activity for funding is the screening of currently unscreened diversion points in the Bay-Delta watershed. An evaluation of the benefits of a screening program for listed species will be conducted immediately and used to improve listed species survival no later than during the 95/96 water year.

5) **Consensus Process:**
CUWA/Ag [sic] will work with CALFED and environmental interests in an open process to determine precise priorities and financial commitments for the implementation of all Category III elements. The

CUWA/AG work plan currently being developed will be revised consistent with these Principles.

6) **Deadline:**
This process will be under the sponsorship or [sic] CUWA/AG, which commits to an open and collaborative approach involving CALFED and the environmental community. It is agreed that detailed implementation for these Principles will be finalized before publication of the final SWRCB standards, which is currently planned by March 31, 1995.

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(2)

Supreme Court, U.S.
FILED
NOV 24 1997
CLERK

No. 97-721

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1997

COUNTY OF SAN JOAQUIN, ET AL.
Petitioners,

v.

STATE WATER RESOURCES CONTROL BOARD, ET AL.
Respondents.

On Petition for Writ of Certiorari
to the California Court of Appeals
for the Third Appellate District

BRIEF IN OPPOSITION OF RESPONDENTS, THE STATE WATER RESOURCES CONTROL BOARD AND ITS MEMBERS

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26pp

QUESTIONS PRESENTED

1. Whether the United States Bureau of Reclamation ("Bureau") was an indispensable party under California Code of Civil Procedure section 389(b) thereby necessitating dismissal of a California state court action for failure to join the Bureau where: (1) the state court action sought changes in the terms and conditions of the Bureau's water right permits for the Central Valley Project ("CVP") that were prejudicial to the interests of the United States; (2) no other party could adequately represent the interests of the Bureau; (3) a pending federal court action against the Bureau by some of the plaintiffs in the state court action alleged many of the same claims that were alleged in the state court action thereby affording plaintiffs an alternative remedy; and (4) the United States invoked its sovereign immunity, and refused to consent to suit against the Bureau in state court.

2. Whether California trial court determinations about indispensable parties under California Code of Civil Procedure section 389(b) are subject, on appeal, to an abuse of discretion or a *de novo* standard of review.

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BRIEF IN OPPOSITION OF RESPONDENTS, THE STATE WATER RESOURCES CONTROL BOARD AND ITS MEMBERS

Respondents, the State Water Resources Control Board and its individual members, John P. Caffrey, Marc Del Piero, James M. Stubchaer, Mary Jane Forster and John W. Brown (collectively, the "SWRCB") hereby respond to the Petition for Writ of Certiorari ("Petition"), and respectfully request that the Petition be denied.

JURISDICTION

Petitioners have invoked the jurisdiction of this Court under 28 U.S.C. section 1257(a). However, no substantial federal question was either decided by, or properly presented to, the California courts below. Consequently, for either prudential or jurisdictional reasons, the Court should decline to entertain any of the purported federal questions presented in the Petition.

STATEMENT

1. The United States Bureau of Reclamation ("Bureau") owns and operates the Central Valley Project ("CVP") in California, the largest reclamation project in the Nation. Pet. App. 4.[1/] The CVP includes New Melones Dam on the Stanislaus River. *Id.* at 5. Some of the petitioners have water supply contracts with the Bureau for New Melones water. *Id.* at 5-6; 43-45. Other petitioners are downstream diverters who have riparian water rights that are allegedly affected by New Melones operations. *Id.*

Petitioners filed a petition and complaint ("complaint") in California superior court against the SWRCB seeking to: (1) invalidate WR 95-6, a water right order of the SWRCB

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1. "Pet." refers to the Petition for Writ of Certiorari; "Pet.App." refers to the Appendix to the Petition; "CT" refers to the Clerk's Transcript on Appeal in the California courts.

which amends some of the terms and conditions in the water right permits of the Bureau, including those for New Melones, CT 2, ¶1(a); 6, ¶21; 8-10, ¶¶26-28; (2) compel the SWRCB to prohibit other CVP operations which are not covered by WR 95-6, CT 3, ¶1(b), 31-41; and, (3) obtain a declaratory judgment prescribing how the SWRCB should apply certain California water laws to the Bureau in future water right proceedings. CT 3, ¶2; 48-49, 51-53. The complaint named the Bureau as a Real Party in Interest. CT 5, ¶19.

After it was served with the complaint, the Bureau appeared specially, and asserted that the California superior court lacked jurisdiction over it by virtue of the sovereign immunity of the United States. CT 664-672. The SWRCB and others then moved to dismiss the action on the ground that the Bureau was an indispensable party under California Code of Civil Procedure section 389 which could not be joined in the action. CT 688-710, 1762-1788.

The superior court applied the factors listed in Code of Civil Procedure section 389(b), and ruled that: (1) the Bureau's interests would be substantially prejudiced if the action proceeded without it; (2) there was a risk of contradictory legal obligations and further litigation if the action proceeded without the Bureau because of a pending federal court action against the Bureau which raised many of the same state law claims alleged in the state court action; (3) some of the petitioners were also plaintiffs in that pending federal court action which provided them an adequate alternative remedy; and, (4) the State of California could not adequately represent the Bureau's interests in the state court action. Pet. App. 23-25. The superior court then dismissed the action on the ground that the Bureau was an indispensable party that could not be joined. Pet. App. 151-153.

Petitioners' opening brief in the California court of appeal framed the issue on appeal as follows:

> "The sole issue in this appeal is whether the United States is an indispensable party under the statutory definition of Code of Civil Procedure §389."

> Appellants' Opening Brief, p. 10, l. 15-17. (Emphasis added).

The California court of appeal similarly stated:

> "The sole issue presented in this appeal is whether the trial court erred in finding the Bureau was an indispensable party, thereby necessitating dismissal of this action." Pet. App. 7.

The court of appeal first ruled that the superior court's indispensable party determination under Code of Civil Procedure section 389(b) should be reviewed under an abuse of discretion rather than a *de novo* standard. Pet. App. 7. In resolving this standard of review issue, the court of appeal referred to the language of section 389(b) which refers to determinations "in equity and good conscience", and the California state court decisions which describe the discretionary nature of indispensable party determinations. Pet. App. 11. The court of appeal then went on to note that because Code of Civil Procedure section 389 had been amended to conform to rule 19 of the Federal Rules of Civil Procedure, it was appropriate to use federal precedents "as a guide to application of [Code of Civil procedure section 389]." [quoting *Kraus v. Willow Park Public Golf Course*, 73 Cal.App.3d 354, 368 n. 9 (1977). (Emphasis added). Pet. App. 12. The court of appeal noted that all of the Federal circuit courts except the Sixth Circuit had concluded that the abuse of discretion standard governed indispensable party determinations under Fed.R.Civ.Pro. 19(b). Pet. App. 12-13, n. 5.

The court of appeal also rejected petitioners' contention that if dismissal of an action for non-joinder of an indispensable party would leave a litigant without an alternative remedy, the action could not be dismissed. Pet. App. 14-16. Instead, the court of appeal concluded that the lack of an alternative remedy was one of several factors to be considered under Code of Civil Procedure section 389, and that how the balance among these factors was struck depended upon the facts and circumstances of each particular case. *Id.*

at 16.

The court of appeal went on to find that it was "not convinced [that] [petitioners] lack an alternative forum." *Id.* at 16. The court of appeal described the overlap between petitioners' federal court action against the Bureau, and the state court action before it. *Id.* at 17-18. The court of appeal pointed out that, "the federal case challenges the Bureau's Central Valley Project operations and seeks to change the Bureau's operations of New Melones and the Central Valley Project to make more water available to [petitioners], which is the same general type of relief sought in the instant case." Pet. App. 17, n. 7. The court of appeal also thought that petitioners' argument that the Bureau would not be prejudiced if the state court action proceeded without the Bureau was "preposterous". *Id.* at 20, n. 11. Finding no abuse of discretion in the trial court's balancing of section 389(b) factors, the court of appeal affirmed the dismissal of the action.

Petitioners then sought review in the California Supreme Court. In accordance with California Rule of Court 28(e)(2), petitioners' Petition for Review to the California Supreme Court set forth the specific issues that petitioners tendered for review. Under Rule 28(e)(2), these are the only issues that need be considered by the California Supreme Court. E.g., *People v. Gionis*, 9 Cal.4th 1196, 1221, n. 19 (1995). The Petition for Review did not identify any federal constitutional or statutory issues for review. Instead, the Petition for Review stated the following under "Issues Presented for Review":

> "The primary issue presented for review is whether a trial court's determination of indispensability of a non-joined party pursuant to Code of Civil Procedure §389(b) is subject to de novo review, or is subject to review for an abuse of discretion. Alternatively, is it an abuse of discretion to dismiss a petition for writ of mandate for review of a decision of the State Water Resources Control Board or other state agency based on the unavailability of the federal

> government as an interested party, where such dismissal results in no judicial review of the decision of the Board (contrary to Water Code § 1360, currently Water Code § 1126), and no judicial review under the California Environmental Quality Act?"
>
> "Within the context of these issues are two substantial issues presented by the circumstances of this case:"
>
> "A. May judicial review of water right proceedings before the State Water Resources Control Board ("Water Board"), as well as judicial review of California Environmental Quality Act ("CEQA") proceedings before other public bodies and other administrative proceedings, be entirely avoided in all cases in which the federal government is an interested party and it refuses to waive its sovereign immunity?"
>
> "B. Must the specific provisions of Water Code § 1360 (currently Water Code § 1126), providing a right of review of Water Board decisions, and the right to obtain review in CEQA proceedings pursuant to Public Resources Code § 21168 and Code of Civil Procedure § 1094.5, give way to the general provisions regarding indispensable parties set forth in Code of Civil Procedure § 389(b)?" Petition for Review by County of San Joaquin, et al., pp. 1-2. (Emphasis added.)

Thus, in addition to the standard of review issue, the only issues presented to the California Supreme Court were whether the indispensable party determination: (1) was an "abuse of discretion" and (2) conflicted with a state law right to a court hearing under the California Water Code and the California Environmental Quality Act.

The California Supreme Court denied review without comment. Pet. App. 1.

2. In dismissing the action because of the inability to join the Bureau, the superior court and court of appeal relied on the fact that petitioners Stockton East Water District, Central San Joaquin Water Conservation District and the County of San

Joaquin had filed a federal court action against the Bureau entitled *Stockton East Water District et al. v. United States et al*, No. CV-F-94-6103-OWW (U.S.D.C. E.D. Cal.). See Pet.App. 9-10, 17-18, 24. The *Stockton East* complaint in federal court raises many of the same claims that were raised in this state court action.[2/] The *Stockton East* complaint also sought similar relief, namely, requiring the Bureau to make more New Melones water available either to satisfy petitioners' water supply contracts or to increase flows past their riparian property. CT 926-930.

Petitioners can assert their state law claims against the Bureau in federal court because section 8 of the Reclamation Act of 1902, 43 U.S.C. section 383, requires the Bureau to comply with California law in the control, appropriation, use, and distribution of CVP water if California law is not inconsistent with clear congressional directives. See *California v. United States*, 438 U.S. 645, 672-675 (1978). Consequently, rather than sue the SWRCB and claim that the SWRCB wrongly allowed the Bureau to operate in violation of state law, petitioners can sue the Bureau directly in federal court under section 8 of the Reclamation Act for the same allegedly illegal CVP operations.

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2. See, for example, the claims that: 1) the Bureau's use of New Melones water to comply with the Principles for Agreement deprives appellants of their contract rights with the Bureau, compare CT 26-27, 38-39 (state court petition, ¶¶70-72, 115, 116), with CT 905-911 (federal complaint, ¶¶49-51, 71, 73); 2) the Bureau violated the Watershed Protection Act, Cal. Water Code §§11460 et seq., compare CT 31-35 (state court petition, 9th cause of action), with CT 919-921 (federal complaint, 8th cause of action); 3) the Bureau is violating the California Constitutional prohibition against unreasonable use of water, compare CT 40-42 (state court petition, 12th cause of action), with CT 921-923 (federal complaint, 9th cause of action); and, 4) the Bureau has violated restrictions on use in its water right permits for the New Melones Dam, compare CT 35-37 (state court petition, 10th cause of action), with CT 917-918, 923-926 (federal complaint, 7th and 10th causes of action).

After the superior court dismissed this action, petitioners Central Delta Water Agency, Reclamation District No. 2072, and R.C. Farms, Inc., who had not joined in the *Stockton East* federal court suit, filed their own federal court action entitled *Central Delta Water Agency, et al. v. United States, et al.*, No.CV-F-96-5738-OWW (U.S.D.C. E.D.Cal.). The *Central Delta* federal court complaint alleged claims against the Bureau that are almost identical to those in this action. The *Central Delta* complaint also named the SWRCB and its individual members as defendants, and alleged a due process claim against them like that in the thirteenth cause of action in this action. The SWRCB was subsequently dismissed as a defendant pursuant to the Eleventh Amendment, but the *Central Delta* action is proceeding against the individual SWRCB members.

ARGUMENT

I. THE DECISION BELOW WAS BASED SOLELY UPON STATE LAW GROUNDS WHICH THIS COURT LACKS JURISDICTION TO REVIEW

Questions 1 and 2 in the Petition present questions regarding indispensable party determinations under Fed.R.Civ.Pro. 19(b). However, the California courts in this case applied state procedural law in California Code of Civil Procedure section 389(b), not the Federal Rules of Civil Procedure. The Superior Court balanced the various fact-intensive factors in Code of Civil Procedure section 389(b), and determined, in the specific circumstances of this case, that the Bureau was an indispensable party. This is a state law question that this Court does not have jurisdiction to review under 28 U.S.C. section 1257(a).

California Code of Civil Procedure section 389(b) is modelled after Fed.R.Civ.Pro. 19(b). See Pet. App. 12. The California court of appeal also looked to federal decisions for guidance in deciding the standard of review for indispensable party determinations under Code of Civil Procedure section 389(b). Pet. App. 12-14. However, that does not convert an indispensable party determination under Code of Civil

Procedure section 389 into a federal question.

In "hybrid" federal-state law situations where state law is interwoven with federal law, the Court has distinguished between situations where a state court feels compelled by federal law to adopt a particular construction of state law (usually to avoid a perceived federal constitutional infirmity), and cases where a state court merely looks to federal law for guidance in construing state law. See *Michigan v. Long*, 463 U.S. 1032, 1041 (1983) (distinguishing situations where "federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached"); *id.* at 1042, n. 7 (need "to determine whether a particular result was guided or compelled by federal law"); *Arizona v. Evans*, 514 U.S. 1, 10 (1995); *Three Affiliated Tribes v. Wold Engineering*, 467 U.S. 138, 155 (1984) (Supreme Court jurisdiction where it appeared that the state court in construing state law "regarded federal law as an affirmative bar"); *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 568 (1977) (Supreme Court jurisdiction where "the Ohio court felt compelled by what it understood to be federal constitutional considerations to construe and apply its own law in the manner it did."). This Court has jurisdiction in the former case where a state law interpretation is compelled by federal law, but not in the latter case where federal law is used for guidance purposes. So long as a state court indicates in its decision that federal law is being used for guidance purposes and is not compelling a particular result, the state law issue is one upon which the state courts have final authority. See *Michigan v. Long, supra,* 463 U.S. at 1041.

In this case, the California court of appeal explicitly stated that it was using federal precedents construing Fed.R.Civ.Pro. 19 "as a guide to application of [Code of Civil procedure section 389]", quoting *Kraus v. Willow Park Public Golf Course*, 73 Cal.App.3d 354, 368 n. 9 (1977). (Emphasis added.) See Pet. App. 12. The court of appeal also cited to *Conrad v. Unemployment Insurance Appeals Bd.*, 47 Cal.App.3d 237, 241 (1975), see Pet. App. 12, where the *Conrad* court also explicitly stated that it is appropriate "to

use federal precedents as a guide to application of the statute." (Emphasis added). See also *Copley v. Copley*, 126 Cal.App.3d 248, 296 (1981) (noting that because Code of Civil Procedure section 389 conforms substantially to Fed.R.Civ.Pro. 19, "the cases relating to the federal rule are relevant.") (Emphasis added). California courts, however, remain free to disregard federal precedents under Fed.R.Civ.Pro. 19(b) altogether. This is illustrated by *People ex rel. Lungren v. Community Redevelopment Agency*, 56 Cal.App.4th 868, 885, n.10 (1997) where the California court of appeal noted, but then declined to follow, federal precedents construing Rule 19 in its indispensable party determination under Code of Civil Procedure section 389(b).

While the court of appeal here cited federal Rule 19 precedents for the standard of review, it did so only after first noting that the language of Code of Civil Procedure section 389(b) and the California cases construing section 389(b) indicated an abuse of discretion rather than a *de novo* standard of review. See Pet. App. 11. Thus, federal Rule 19 precedents merely supported the court of appeal's conclusion about the standard of review which was independently based on that court's reading of California case and statutory law.

In their Petition for Review in the California Supreme Court, petitioners also claimed that there was a conflict between state court of appeal decisions on the standard of review for indispensable party determinations. See Petition for Review by County of San Joaquin et al, pp. 3-4; 16-19. While petitioners also claimed that there was a conflict among federal circuit courts over the standard of review under Rule 19(b), petitioners urged that "review [by the California Supreme Court] can resolve the subject state conflict that will be present regardless of whether the federal conflict is ever resolved." *Id.* at 19, l. 2-4. (Emphasis added). Thus, petitioners themselves recognized that any state court conflict over the standard of review under section 389(b) is independent of, and will not be resolved by, resolution of any federal court conflict over the standard of review for Rule 19(b) determinations.

The conclusion that the Bureau was an indispensable party turned on the interpretation of California precedents, mainly *Sierra Club, Inc. v. California Coastal Commission*, 95 Cal.App.3d 495 (1979) and *Vanoni v. County of Sonoma*, 40 Cal.App.3d 743 (1974), not any federal court precedents. In fact, the superior court explicitly stated that *Sierra Club* was "controlling," Pet. App. 24, ¶2, and the court of appeal did not disturb that conclusion. Thus, from the face of the decisions below it is clear that federal court precedents provided guidance only, and that the disposition was controlled by California rather than federal law.

In *Miller's Executors v. Swann*, 150 U.S. 132, 137 (1893) the Court rejected the notion that it had jurisdiction to review a state statute merely because the statute was patterned after, or incorporated, federal standards. The Court used state procedural law patterned after federal rules of procedure as an example:

> "A State may prescribe the procedure in the Federal courts as the rule of practice in its own tribunals; it may authorize the disposal of its own lands in accordance with the provisions for the sale of the public lands of the United States; and in such cases an examination may be necessary of the acts of Congress, the rules of the Federal courts, and the practices of the Land Department, and yet the questions for decision would not be of a Federal character. The inquiry along Federal lines is only incidental to a determination of the local question of what the State has required and prescribed. The matter decided is one of state rule and practice." (Emphasis added)

To "federalize" state law and make it subject to review under 28 U.S.C. section 1257(a) merely because state law is patterned after, or uses language similar to, a federal statute would drastically upset the balance of Federalism. It would diminish the importance of the state courts by eliminating the finality with which they interpret state law, and it would require state legislatures to accept federal judicial supervision as the price for using federal models in their legislative

drafting -- to say nothing of further increasing this Court's already overcrowded docket.

II. NONE OF THE FEDERAL QUESTIONS IN THE PETITION WERE EITHER DECIDED BY, OR PROPERLY PRESENTED TO, THE CALIFORNIA COURTS

With very rare exceptions, this Court "will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision [this Court] ha[s] been asked to review." *Adams v. Robertson*, 117 S.Ct. 1028, 1029 (1997). Neither the California superior court nor the court of appeal addressed any of the federal law questions presented in the Petition. Instead, those courts treated the issue as one solely of state law of whether the Bureau was indispensable under the statutory criteria of Code of Civil Procedure section 389(b). Because the California courts did not address any of petitioners' federal law claims, petitioners have the burden of demonstrating that those issues were, in fact, properly presented to the California courts. *Adams, supra*, 117 S.Ct. at 1029. Those federal law issues were not presented to the California courts, either properly or otherwise.

First, Supreme Court Rule 14.1(g)(i) requires petitioners to specify in their Petition the portions of the record which establish that their federal questions were presented to the trial and appellate courts. Petitioners have failed to comply with Rule 14.1(g)(i) for every question except their "due process" question. Nowhere in their Petition have petitioners identified where they raised any federal Equal Protection claim below (Question IV), or any claim regarding Section 8 of the Reclamation Act of 1902 (Questions III and VI), or any claim that state court determinations under California Code of Civil Procedure section 389(b) are controlled by federal court decisions construing Fed.R.Civ.Pro. 19(b) (Questions I and II). This alone is enough to deny review of these questions.

Second, while petitioners say that they raised Question

V, their "due process" question in Central Delta's Statement of Issues before the SWRCB, Pet. 11, and in their 13th cause of action in their state court complaint, *id.* at 13-14, these references are to an entirely different due process claim. The due process claim in the Statement of Issues and the 13th cause of action alleged that petitioners were denied due process in the SWRCB proceeding because of alleged *ex parte* contacts that occurred during that SWRCB administrative proceeding. In contrast, the due process claim in the Petition alleges that the dismissal of this state court action because of the inability to join the Bureau is a denial of due process.

Third, petitioners' reliance upon their reply brief in the court of appeal as a basis for having raised the "due process" issue, see Pet. 16-18, is unavailing. Under California law, the court of appeal need not consider issues that are raised for the first time in a reply brief to which the opposing party cannot respond. See e.g., *Dixon v. Board of Trustees*, 216 Cal.App.3d 1269, 1286 (1989) ("it is improper to raise new substantive arguments for the first time in a reply brief and an appellate court has no obligation to address the merits of such arguments."); *Sunseri v. Camperos Del Valle Stables, Inc.*, 185 Cal.App.3d 559, 562 (1986) ("Western World raises several other issues for the first time in its reply brief. As this is improper, we need not address them.") This failure to comply with state procedural rules for the proper presentation of issues is sufficient to preclude review by this Court. See e.g., *Webb v. Webb*, 451 U.S. 493, 498 (1981); *Beck v. Washington*, 369 U.S. 541, 549-554 (1962); *Mutual Life Insurance Co. v. McGrew*, 188 U.S. 291, 309 (1903).

Fourth, none of the references to "due process" that petitioners have identified specify that it is the Due Process Clause of the Federal, rather than California Constitution that is being referred to. Indeed, Questions I, IV and V in the Petition continue to refer vaguely to "Due Process" and "Equal Protection" without specifying the federal nature of either of those claims. Consequently, petitioners have failed the "minimum requirement that it must be clear that a *federal* claim was presented." *Adams, supra*, 117 S.Ct. at 1031, n. 3. (emphasis in original); *Bankers Life & Casualty Co. v.*

Crenshaw, 486 U.S. 71, 76-78 (1988); *Webb v. Webb*, *supra*, 451 U.S. at 501 ("At a minimum, . . . there should be no doubt from the record that a claim under a *federal* statute or the *Federal* Constitution was presented in the state courts and that those courts were apprised of the nature or substance of the federal claim at the time and in the manner required by the state law.") (emphasis in original); *Bowe v. Scott*, 233 U.S. 658, 665 (1914) ("it is settled that such an averment making no reference to the Constitution of the United States and asserting no express rights thereunder is solely referable to the state constitution . . . and affords no basis whatever for invoking the jurisdiction of this court.")

Fifth, petitioners treated the indispensable party issue below as one solely of state law. Their opening brief in the court of appeal stated that the "sole issue" on appeal is whether the United States is an indispensable party "under the statutory definition of Code of Civil Procedure § 389." *Supra*, p. 2. Their petition for review in the California Supreme Court also framed the issue as whether it was an "abuse of discretion" to dismiss the action because of the inability to join the Bureau, and the only rights allegedly infringed as a result of such a dismissal were state law rights to a judicial hearing under the California Water Code and California Environmental Quality Act. *Supra*, pp. 4-5.

Moreover, petitioners conceded below that the Bureau enjoyed sovereign immunity, and could not be joined in this action. Petitioners' memorandum in the superior court stated:

> "The doctrine of sovereign immunity protects the United States from suit, except where it consents thereto. [citation omitted] In the matter at hand, it appears that no express statute authorizes a lawsuit against the United States regarding the water rights permits issued to the United States by [the SWRCB]. As such, the United States is not subject to jurisdiction of the State courts and cannot be served in this action." CT 1294.

Petitioners' Opening Brief in the court of appeal also stated:

> "it does not appear that the United States is subject to the jurisdiction of the state courts in this case." Br. at 11, l. 12-14.

Petitioners' brief went on to state:

> "The doctrine of sovereign immunity protects the United States from suit, except where it consents thereto. [citation omitted] In the matter at hand, it appears that no express statute authorizes a lawsuit against the United States regarding the water rights permits issued to the United States in state court by [the SWRCB]. Moreover, even under the unique circumstances presented here . . . it does not appear that the United States can be joined in this action." *Id.* at 22-23.

Thus, petitioners conceded that the Bureau was entitled to sovereign immunity but argued that the action should be allowed to proceed without the Bureau. Petitioners never raised the issue of any federal constitutional or statutory restrictions upon indispensable party determinations under state law, nor did they challenge the United States' sovereign immunity. In these circumstances, where no federal law claim was made against the application of state law, the Court should decline review of any subsequently proffered federal questions. See *Zadig v. Baldwin*, 166 U.S. 485, 486-488 (1897) (where validity of state law was assumed during state court proceedings, no Supreme Court jurisdiction to consider later federal constitutional challenge to state law).

II. NONE OF THE FEDERAL QUESTIONS IN THE PETITION ARE SUBSTANTIAL ENOUGH TO MERIT REVIEW BY THIS COURT

1. It is well-established that if the United States is an indispensable party and has not waived sovereign immunity, the action must be dismissed. See e.g., *California v. Arizona*, 440 U.S. 59, 61-63 (1979); *Texas v. New Mexico*, 352 U.S. 991 (1957); *Arizona v. California*, 298 U.S. 558, 568-572 (1936); *Minnesota v. United States*, 305 U.S. 382, 386-388

(1939); *Morrison v. Work*, 266 U.S. 481, 485-486 (1925). The essence of the questions in the Petition is whether "due process" or "equal protection" or section 8 of the Reclamation Act somehow modify this principle by either: (1) waiving the sovereign immunity of the United States and allowing it to be joined without its consent; or (2) allowing petitioners' action to proceed even if the United States is an indispensable party that will be prejudiced. There is no need to grant review in this case to summarily reject either of these arguments. Particularly when petitioners conceded below that the United States was immune from suit, and where petitioners have an alternative federal court remedy against the Bureau under section 8 of the Reclamation Act, this case would be a poor vehicle to consider any questions about the United States' sovereign immunity.

2. There is no need to resolve any split among the federal courts of appeals over the standard of review for indispensable party determinations under Fed.R.Civ.Pro. 19(b). The standard of review has no effect upon the outcome of this case. The United States is clearly an indispensable party in this action which seeks to invalidate terms and conditions of the Bureau's water right permits, and drastically change the way that the Bureau can operate the CVP. Under either a *de novo* or abuse of discretion standard, the Superior Court's judgment of dismissal would be affirmed.

Moreover, the overwhelming weight of federal authority is that indispensable party determinations under Fed.R.Civ.Pro. 19(b) are reviewed under an abuse of discretion, not a *de novo* standard. See *Thunder Basin Coal Co. v. Southwestern Public Service Co.*, 104 F.3d 1205, 1210 (10th Cir. 1997); *HB General Corp. v. Manchester Partners, LP*, 95 F.3d 1185, 1190 (3rd Cir. 1996); *Burka v. Aetna Life Insur. Co.*, 87 F.3d 478, 483 (D.C.Cir. 1996); *Pembina Treaty Committee v. Lujan*, 980 F.2d 543, 545 (8th Cir. 1992); *Sindia Expedition, Inc. v. Wrecked and Abandoned Vessel Known as the Sindia*, 895 F.2d 116, 121 (3rd Cir. 1990); *Travellers Indemnity Co. v. Dingwell*, 884 F.2d 629, 635 (1st Cir. 1989); *Icon Group, Inc. v. Mahogany Run Development Corp.*, 829 F.2d 473, 476 (3rd Cir. 1987);

CloverLeaf Standardbred Owners Assn. v. National Bank of Washington, 699 F.2d 1274, 1276-1277 (D.C.Cir. 1983); *Walsh v. Centeio*, 692 F.2d 1239, 1241-1243 (9th Cir. 1982); *Bakia v. Los Angeles County*, 687 F.2d 299, 301 (9th Cir. 1982). In fact, only the Sixth Circuit decision in *Keweenaw Bay Indian Community v. State*, 11 F.3d 1341 (6th Cir. 1993) appears to have taken a contrary position.

Even if the California court of appeal erred by following the weight of federal precedent, that would have little impact on other federal courts which are unlikely to rely upon a California court of appeal decision construing Code of Civil Procedure section 389(b) as precedent for Fed.R.Civ.Pro. 19(b).

Indispensable party determinations also are fact-intensive, and dependent upon the particular circumstances of each case. To use up this Court's limited docket with cases like this which are fact-driven, and which involve discretionary judgments by the trial court is unwarranted. The indispensable party determination and resulting dismissal of the action did not affect the assertion of any federal rights because petitioners' substantive claims in its state court complaint against the SWRCB were based upon state rather than federal law.

3. Petitioners have an alternative federal court remedy under section 8 of the Reclamation Act by which they can assert against the Bureau all of their substantive state law claims concerning the control, appropriation, use, and distribution of CVP water. The superior court found that petitioners' *Stockton East* federal court suit was an adequate alternative remedy. This Court customarily accepts factual findings of state trial courts absent exceptional circumstances. *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 111 (1980); see also *Hernandez v. New York*, 500 U.S. 352, 366 (1991); *Fry Roofing Co. v. Wood*, 344 U.S. 157, 160 (1952). Petitioners' *Central Delta* federal court suit against the individual members of the SWRCB also affords petitioners a federal court remedy for any claims of an alleged denial of federal due process in the SWRCB water right

proceeding. Thus, the assumption in the Petition that petitioners have no federal or state court remedy by which they can challenge the SWRCB's water rights order and the Bureau's CVP operations is factually incorrect.[3/]

Petitioners have used the SWRCB as a surrogate for the Bureau in this litigation. Their state court action sought to compel the SWRCB to change the Bureau's water right permits; to bring enforcement actions against the Bureau to force it to change CVP operations; and to rule in future water right proceedings that the Bureau must provide petitioners with more water. (CT 1-64). In their dispute with the Bureau over New Melones water, petitioners want two bites of the apple: they want to bring one lawsuit directly against the Bureau in federal court under section 8 of the Reclamation Act, and a second suit against the SWRCB in state court as a surrogate for the Bureau.

This case is about due process and fairness, but it is mainly about due process and fairness for absent parties. Because the interests of the United States would be seriously and adversely affected by this action, the United States must be joined as a party. Because the United States has declined to waive its sovereign immunity in state court, there is no alternative but to dismiss the action. As Justice Holmes said long ago, the rights of the United States "cannot be tried behind its back." *Louisiana v. Garfield*, 211 U.S. 70, 78 (1908).

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3. The SWRCB also disputes petitioners' portrayal of the nature of the Principles for Agreement, Pet. 22-24, and the relationship between the Bureau's operation of the CVP and the Department of Water Resources' operation of the State Water Project, Pet. 24, 29.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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November, 1997